Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 896

GEORGE K. WYMAN, as Commissioner of the Department of Social Services of the State of New York, and the DEPARTMENT OF SOCIAL SERVICES OF THE STATE OF NEW YORK,

Defendants-Appellants,

against

EDNA ROTHSTEIN, SYLVIA MILLER, HENRIETTA BATSON, CATHERINE JONES and DOLORES HARVANEK, as individuals and on behalf of all other persons similarly situated,

Plaintiffs-Appellees,

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR SOUTHERN DISTRICT OF NEW YORK.

Docketed November 28 1969
Probable Jurisdiction Noted February 24, 1970

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Date	*Proceedings*
June/25/69	Complaint and issued summons.
June/26/69	Summons and return. Copy received by Attorney General's Office on 6/25/69.
June/26/69	Order to Show Cause—Ordered that Defts. show cause in room 506 on 7/1/69 at 10:00 why an order should not issue a preliminary and permanent injunction. Tasker J. Mailed notice.
June/26/69	Plaintiffs memorandum of law in support of motion for a temporary restraining Order.
June/26/69	Plaintiffs memorandum in support of motion for a temporary restraining order. Appendix continued.
July/7/69	Memorandum decision and order for three Judge Court. Ordered motion to convene a three judge court is granted and the case is referred to the Chief Judge of the Circuit. Motley J.
July/10/69	Designation or Judges ordered that in addition to Hon. Motley, DJ. Hon. Hays, C.J. and Hon. Mansfield, DJ are appointed to hear and determine said cause. Lombard, CJ. CH.
July/11/69	Motion for leave to take depositions upon oral examination with 20 days after commencement of action.
July/11/69	Order granting motion for leave to take depositions upon oral examination. Motley, J.
July/17/69	Plaintiffs Memorandum of Law in support of their motion.
July/17/69	Answer of defendants to complaint.
July/17/69	Notice of Motion re: summary judgment. (3-Judge court).
July/17/69	Memorandum of defendants in opposition to plaintiffs' motion to convene a 3-judge statutory court.

Relevant Docket Entries.

Date	*Proceedings*
July 17 69	Plaintiffs Memorandum of Law in support of their motion for pre. in.
Aug. 4 69	Opinion #30078. 3-Judge Court. Hays, C.J., Mansfield, D.J. and Motley, D.J. Plaintiffs' motion for preliminary relief is granted to the extent indicated. Trial of the action will commence on 10/6/69 at 10:30 A. M. Defendants' motion for summary judgment is denied. The foregoing constitutes the Court's findings of facts and conclusions of law. Submit Order on Notice in Accordance With Rule 65(d) FRCP.
Sept. 12 69	Three Judge Court Order—Ordered pending further order of this court or termination of this action defendants, their agents and employees are restrained as indicated, etc. (2) Defendants motion for summary judgment is denied. Hays, U.S.C.J. Mansfield U.S.D.C. and Motley U.S.D.J.
Sept. 12 69	Defendants memorandum of law in opposition to plaintiffs' motion.
Oct. 3 69	Application for adjournment of trial.
Oct. 3 69	Memo. End. on adjournment for trial filed this day. The attached motion is granted. It is so ordered. 3 Judges—Hays, C.J., Mansfield, D.J. and Motley, D.J.
Oct. 6 69	Order to Show Cause re: leave to intervene. Ret. Room 1106 on 10/10/69 at 3:30 P.M. (to Motley, J.).
Oct. 8 69	Summons and complaint by Burr C. Hollister.
Oct. 10 69	Plaintiffs-applicants memorandum of law.
Oct. 10 69	Defendants' notice of appeal to the U.S.S.C.
Oct. 15 69	Affidavit of Avram Weisberger.
Oct. 16 69	Affidavit of Philip Weinberg in support of defendants application to vacate.

Relevant Docket Entries.

Date	*Proceedings*
Oct./16/69	Defendants objections to orders submitted for settlement.
Oct./22/69	Order to Show Cause Ret. before Judge Hays, C.J. on 10/27/69 at 4:30 P.M. re: stay execution of orders enjoining.
Oct./22/69	Notice of Settlement and Order ordered plaintiffs Catherine Jones and Dolores Harvanke have leave to intervene on behalf of themselves. Sd Motley, J.
Oct./27/69	Statutory Court hearing held Atty. Gen. application for stay of preliminary injunction. Denied. Hays, C.J., Mansfield, J., Motley J.
Oct./27/69	Record of proceedings dated 7 15 69.
Oct./27/69	Notice of Appeal to the Supreme Court of the United States.
Oct./31/69	Affidavit of Chester T. Williams.
Oct./31/69	Affidavit of Burr C. Hollister in opposition to defendants motion.
Oct./31/69	Pltffs memorandum of law in opposition to defts motion.
Nov./13/69	Filed Order ordered that the clerk of this court is authorized and directed to transmit to the Clerk of the Supreme court all original papers filed in the Office of the Clerk of this CoCourt and said records are to be safely kept by the Supreme Court of the U. S. and that they be returned to the clerk of this court upon conclusion of appeal. Mansfield, J.
Nov./17/69	Certified record on appeal to the U. S. Supreme Court.

* The dates indicated refer to the date of filing with the Clerk of the Southern District not necessarily to the date submitted to Court.

Complaint.

I

Plaintiffs on behalf of themselves and all other persons similarly situated seek a declaration that New York Social Services Law, Sections 131 as amended Laws Ch. 184, March 31, 1969 and 131-a added Laws Ch. 184, and as amended Laws Ch. 411, 1969 are in violation of the Fourteenth Amendment to the Constitution of the United States insofar as said sections have the effect of denying equal protection of the law, and are violative of the Social Security Act, 42 U.S.C. § 301 et seq. and the regulations promulgated thereunder.

Plaintiffs seek to enjoin any action under the aforesaid Statutes to reduce the quantum of public assistance that they and others similarly situated now receive.

II

PRELIMINARY STATEMENT

On March 29, 1969, the Legislature of the State of New York enacted § 131-a (see Exhibit A) which reduces by significant amounts the "standard of need" and actual grants to be paid to public assistance recipients in New York, as hereinafter more fully set forth. Such reductions were made pursuant to express legislative findings in the Act of a "spiraling rise of public assistance rolls and the expeditures therefor," the "economic concern of the people of the State of New York," and the necessity for the legislature to set "the costs of delivering the needs of public assistance recipients in the respective social services districts of the states." Law Ch. 184, § 1, March 31, 1969.

The aforesaid standards and maximum grants will be fully implemented on July 1, 1969.

The New York Act is in direct conflict with the requirements of federal law, denies recipients of public assistance in New York the protections and entitlements afforded them by federal law, and causes serious and irreparable harm to said recipients. Specifically, as hereinafter more fully set forth, the New York requirements unreasonably and irrationally limit standards and maximums of grants to recipients who receive Aid to the Aged and Aid to the Disabled and Aid to the Blind and who reside in Nassau and Westchester Counties and elsewhere outside of New York City to levels significantly lower than those applicable to recipients similarly situated who reside in New York City despite similarity in living costs. The latter distinctions violate federal statutory requirements mandating uniform standards of need and maximum grants throughout the state, set forth hereinafter, and additionally, the Equal Protection Clause.

III

Jurisdiction

The jurisdiction of the Court is based upon:

(a) 28 U.S.C. §§ 1331, 1337 and 1343.

(b) 28 U.S.C. §§ 2201 and 2202.

(c) 42 U.S.C. §§ 1983 and 1988.

(d) United States Constitution, Article VI and the Fourteenth Amendment.

The amount in controversy, exclusive of interest and costs, exceeds $10,000.

IV

Statement of Claim

1. Pursuant to the Social Security Act of 1935, 42 U.S.C. §§ 301 et seq., New York cooperates with the Federal Government in providing public welfare assistance to needy persons under a New York "state plan," consisting of state statutes and regulations and approved by the United States Department of Health, Education and Welfare. In order to participate in said program New York must comply with all pertinent federal statutes and regulations.

2. Pursuant to the state plan, eligible individuals receive regular recurring semi-monthly or monthly checks for food, rent and other items of basic subsistence. Grants are given for food, household supplies, and recurring personal needs, and a separately computed amount for actual rent and utilities. It is the basic grant for food and recurring needs that is at issue in this case.

3. Prior to September 1968, all recipients in New York State were also eligible for "special needs" grants to provide for lacking, deteriorated or outgrown items of furniture, clothing, kitchen supplies and other items. The provision for such grants recognized that the "regular and recurring" grant did not provide sufficient monies to recipients to permit them to purchase or replace the needed items which were the subject of the "special needs" grants.

4. Among other things, the "special needs" grants provided monies for the purpose of:

(a) Supplying families with an amount for home furnishings and clothing consistent with a minimal standard of health and decency at the time a family began receiving public assistance and from time to time thereafter.

(b) Replacing essential items of home furnishings and clothing as they became worn out, unsafe, or a hazard to health.

(c) providing for telephones for those persons demonstrating medical or other necessity, special diet requirements pursuant to doctors' orders, restaurant meals for those unable to cook at home, travel for welfare and medical business, layette for newborn infants, job-hunting expenses, school fees, burial expenses, and so forth.

5. On August 27, 1968, as the result of a substantial increase in special needs grants in New York City because of proper payments for legitimate needs, the City effectuated under the guise of a "demonstration project," a substantial reduction in its expenditures and in the amounts paid to many needy families by eliminating all special needs grants for clothing and household furnishings and providing instead a "special flat quarterly grant" totaling $100 per year per recipient allegedly to cover the cost of such items. Said "special flat quarterly grant" is an addition to the "regular and recurring" grant. Recipients continued to remain eligible for grants for the items of special need enumerated in paragraph (4)(c) above.

6. The so-called "special flat quarterly grant" at no time applied to persons residing in counties of New York State other than those constituting the City of New York. Recipients outside of New York City continued to be eligible for all special needs grants. Thus plaintiffs herein continued to receive grants for special needs under existing § 131 of the Social Services Law.

7. On or about March 29, 1969, the New York State Legislature, which had previously authorized the State Department of Social Services to establish grant levels, adopted Social Services Law § 131-a and set its own stand-

ards of need and maximum grants, exclusive of rent and fuel, for persons living in New York City as follows:

Number of persons in Household

One	Two	Three	Four	Five	Six	Seven	For each additional person
$70	$116	$162	$208	$254	$297	$340	$43

and the following standards of need and maximum grants for recipients outside of New York City:

Number of persons in Household

One	Two	Three	Four	Five	Six	Seven	For each additional person
$60	$101	$142	$183	$224	$257	$290	$33

8. (a) Thereafter by Laws, Ch. 411, May 9, 1969 the said section 131(a) of the Social Services Law was amended to provide:

> Provided it accords with federal requirements, the regulations of the department shall provide that the commissioner, with respect to any social services district to which subdivision three applies, may promulgate a schedule of monthly grants and allowances for greater or lesser amounts than established by the regulations of the department applicable to such district, but not to exceed the maximums prescribed by subdivision two, for all items of need exclusive of shelter and fuel for heating, if it is established that in such district the total cost of the items included in the schedule applicable to such district actually is more or

less, as the case may be, than the cost thereof reflected in such schedule. A social services official may, with the approval of the appropriate local legislative body, make application to the department for the promulgation of a schedule pursuant to the subdivision. (See Appendix B)

8. (b) Thereafter on or about June 5, 1969 a Bulletin (See Appendix C) was issued and a schedule (SA-2) was adopted by the New York State Department of Social Services setting forth standards of assistance for recipients of public assistance in Nassau and Westchester Counties and in certain other counties to become effective July 1, 1969 as follows:

One	Two	Three	Four	Five	Six	Seven	For each additional person
$65	$107	$149	$191	$233	$270	$307	$37

8. (c) As the result of these enactments, the amounts for which plaintiffs qualify under law are substantially reduced, as is demonstrated in the tabulation set forth subsequently herein. These reduced "maximum monthly grants" will become effective July 1, 1969, and the New York State Department of Social Services is now taking the appropriate administrative steps to allow for effective and complete implementation throughout the State by July 1, 1969.

9. By adopting Section 131-a, the Legislature lowered the standards and significantly reduced the grants available to recipients in the following way, among others:

(a) Cost of living increments which had been added to the "regular recurring" grants are wiped out for numerous

families, and the families reduced below standards existing in July 1967.

(b) The "special flat quarterly grant" for New York City residents is abolished.

(c) Recipients living in certain places outside the City of New York, such as plaintiffs who reside in Nassau and Westchester counties and who presently receive "regular and recurring" grants equal to those living in New York City because of equally high or higher living costs, are even further reduced in the standards and grants.

(d) The "special needs" grants for recipients living outside New York City are abolished.

10. (a) United States Department of Health, Education and Welfare regulations require that state plans must:

> "Provide that the standard [of assistance] will be uniformly applied throughout the State." 45 C.F.R. § 233.20(a) (2) (iii), 311 Fed. Reg. 1394 (Jan. 29, 1969) and
>
> "Provide that payment will be based on the determination of the amount of assistance needed and that, if full individual payments are precluded by maximums or insufficient funds, adjustments will be made by methods applied uniformly state-wide." 45 C.F.R. § 233.20(a) (2) (viii), 311 Fed. Reg. 1394 (Jan. 29, 1969)

(b) The standards of assistance and maximum grants adopted by the Legislature in Section 131-a do not apply uniformly nor are the discriminations in amounts granted based on any rational consideration of living cost. For example, the living costs of plaintiffs and their class who are residents of Nassau and Westchester Counties are as

high or higher than those experienced by residents of New York City, and public assistance grants to them were and are now equal. They will no longer be so under the new statutory scheme.

11. The reduction in the standard of need will render ineligible for aid needy, aged and disabled persons whose income and other resources were just below welfare standards and will now equal or exceed the reduced standard.

12. Unless this Court declares the reduction invalid and enjoins the implementation thereof, the aforementioned unlawful result will obtain on July 1, 1969.

V

Plaintiffs

1. (a) Plaintiffs are all citizens of the United States and reside in the Counties of Nassau and Westchester, State of New York. Plaintiffs bring this action, pursuant to Rule 23 of the Federal Rules of Civil Procedure, on their own behalf and on behalf of all individuals and families similarly aggrieved by the implementation of Section 131-a of the New York Social Services Law in violation of the Social Security Act and federal regulations.

Plaintiffs are members of a class of recipients of public assistance under the Aid to the Aged, Blind or Disabled program residing in Nassau and Westchester Counties and other urban or suburban counties other than those within the City of New York whose grants have been reduced below those of persons with identical need in the City of New York in violation of the Social Security Act and regulations promulgated thereunder, and the Fourteenth Amendment to the Constitution of the United States.

(b) Plaintiffs bring this action as a class action because the questions of fact and law are common to the plaintiffs and the class they represent, the members of the class are so numerous as to make joinder of parties impracticable, the claims of the plaintiffs are typical of the claims of all members of the class, the plaintiffs fairly and adequately represent the claims of all the members of the class, the defendant is acting on grounds generally applicable to the entire class, the questions of law and fact common to the class predominate over any questions affecting individual members, and class action will best provide for a fair and efficient adjudication of this controversy.

2. (a) Plaintiff Miller is a recipient of public assistance under the Aid to the Disabled program and receives from the Nassau County Department of Social Services, exclusive of rent and fuel, $730.59 per month computed as follows (May 1, 1969 Budget)

Basic needs (½ share)	$ 55.00
Phone	4.45
AABD allowance	5.00
Special diet	5.40
Homemaker (net)	556.92
Social Security for employer	28.08
Social Security for employee	28.08
Food for homemaker	47.66
$730.59	Total monthly assistance

(b) Plaintiff Rothstein is a recipient of public assistance under the Aid to the Aged program and receives from the Nassau County Department of Social Services $85.90, exclusive of rent and fuel, computed as follows:

Basic needs	[illegible]
Age Allowance	[illegible]
Telephone	[illegible]
Transportation	[illegible]
Extra Size Clothing	[illegible]
	[illegible] Total monthly assistance

In addition plaintiff Rothstein has pending a request for an additional allowance for a medically necessary special diet.

(c) Plaintiff Batson is a recipient of public assistance under the Aid to the Blind program and received on June 1, 1969 from the Westchester County Department of Social Services $166.70 (she also receives $[illegible] in Social Security benefits) computed as follows:

Pre-added allowance	$ [illegible]
Shelter	[illegible]
Aid to the Blind (Group II)	[illegible]
Allowance for AB	[illegible]
Special diet	[illegible]
Telephone	[illegible]
Food Delivery	[illegible]
Transportation for Housekeeper	[illegible]
Housekeeper	[illegible]
Seeing Eye Dog allowance (food)	[illegible]
Aid in Reading	[illegible]
Housekeeper lunch	[illegible]
	[illegible]
	—[illegible] (Social Security benefit)
	$[illegible]

3. Under the challenged law these plaintiffs will receive assistance at the lower rates provided for recipients residing outside New York City as set forth.

Plaintiff	*Current Monthly Grant*	*New York City Grant*	*Nassau/Westchester Grant*
Miller	$730.30	$70.00	$65.00
Rothstein	83.90	$70.00	65.00
Batson	166.70	68.75	58.75*

* Mrs. Batson's grant is shown here as it includes rent and utilities because of the difficulties in computing her budget in view of her Social Security income.

VI

Defendants

4. The defendant State Department of Social Services, under New York Social Services Law § 20, has primary responsibility for promulgating regulations and instituting procedures for the administration and distribution of public assistance in New York State, in accordance with the requirements of the federal Social Security Act, the Social Services Law of New York, and the Constitutions of New York and the United States.

5. Defendant George K. Wyman, as Commissioner of the Department of Social Services of the State of New York, has primary responsibility for the administration of that Department in compliance with the law. New York Social Services Law, § 34.

VII

As a first cause of action, plaintiffs allege:

1. Section 131-a violates the Social Security Act of 1935 and the regulations made pursuant thereto because it is

not a plan of *uniform statewide application* in that public assistance recipients in Nassau and Westchester Counties and other non-New York City areas are singled out for special, unfavorable and discriminatory treatment.

2. Section 1602(a) (1), of the Social Security Act, 42 U.S.C. § 302(a) (1), requires that a state plan "shall be in effect in all political sub-divisions of the state, and, if administered by them, be mandatory upon them." As interpreted by the Department of Health, Education and Welfare in its "Handbook of Public Assistance Administration" (the binding federal regulations of the United States Department of Health, Education and Welfare), the statute requires that the plan "shall . . . provide for administration in accordancee with standards that are mandatory and equitable throughout the State." (Pt. II § 4200(1) (1964).

3. On January 29, 1969 the Department of Health, Education and Welfare promulgated 45 C.F.R. § 233.20, 34 Fed. Reg. 1394, which provides in pertinent part:

§ 233.20. Need and Amount of Assistance

a) *Requirement for State Plans.* A State Plan for OAA, AFDC, AB, APTD OR AABD must, as specified below:

1. *General.* Provide that the determination of need and amount of assistance for all applicants and recipients will be made on an objective and equitable basis. . . .

2. *Standards of Assistance.* (i) Specify a Statewide standard, expressed in money amounts, to be used in determining (a) the need of applicants and recipients and (b) the amount of the assistance payment.

. . .

iii. Provide that the standard will be uniformly applied throughout the State.

4. Although the legislative findings and purpose of the March 29, 1969 Act state that the reductions "will promote greater uniformity and equality of treatment," plaintiffs as residents of Nassau and Westchester Counties will receive substantially less public assistance under Section 131-a than persons identically situated but living within New York City.

5. The cost of living in Nassau and Westchester Counties is as high as in New York City. The United States Department of Labor in its statistical analysis of the cost of living makes no distinction between costs in New York City and neighboring counties. The same supermarket chains and department stores service both areas and charge substantially the same prices for all items including basic necessities in both New York City and Nassau and Westchester Counties. Certain other costs, such as transportation costs are higher in Nassau County.

6. Defendant Wyman recognized this absence of cost of living differential in promulgating Section 352.4 of Title 18 of the New York Code, Rules and Regulations which established identical standards of need for public assistance recipients living in New York City and Nassau and Westchester.

7. On information and belief, there was neither experience, information or evidence brought before either house of the New York State legislature, any committee thereof or before the defendants justifying or warranting a legislative or administrative finding that there was an actual cost of living differential between New York City and Nassau and Westchester.

8. Section 131-a is in direct violation of the federal requirement that standards will be uniformly applied throughout the State, in that it sets different and lower standards for residents of Nassau, Westchester and elsewhere without regard to their equal need, and therefore should be declared invalid and defendants should be enjoined from implementing a reduction of benefits pursuant thereto.

VIII

AS AND FOR A SECOND CAUSE OF ACTION:

1. Bulletin 134 and the schedules contained therein are in direct violation of the Federal requirement that standards will be uniformly applied throughout the state in that it sets different and lower standards for residents of Nassau, Westchester and elsewhere without regard to their equal need, and therefore should be declared invalid and defendants should be enjoined from implementing a reduction of benefits pursuant thereto.

IX

AS AND FOR A THIRD CAUSE OF ACTION, PLAINTIFFS ALLEGE:

1. Section 131-a establishes a procedure whereby residents of Nassau, Westchester and other areas outside the City of New York must make an affirmatiye showing of equal need to obtain benefits equivalent to those granted those similarly situated but residents of the City of New York. The statutory scheme prevents plaintiffs from obtaining a greater quantum of assistance even if a showing of greater need is made.

2. The legislative scheme shows a preference for residents of New York City and thus violates both the Federal

requirements that standards will be applied uniformly throughout the state.

X

AS AND FOR A FOURTH CAUSE OF ACTION:

1. There is no legitimate or rational purpose served by discriminating against public assistance recipients in the Aid to the Disabled program, the Aid to the Aged and Aid to the Blind programs, living outside of New York City, and more particularly in Nassau and Westchester Counties.

2. Section 131-a denies plaintiffs and all members of their class the equal protection of the laws in violation of the Fourteenth Amendment and therefore should be declared invalid.

XI

Plaintiffs have no adequate remedy at law. Defendant will continue to cause, and threaten to cause, irreparable injury unless enjoined forthwith.

WHEREFORE, plaintiffs respectfully pray on behalf of themselves and all others similarly situated that a three judge District Court be convened for the following purposes:

1. Enter preliminary and permanent injunctions enjoining the defendant, his successors in office, agents and employees, and all other persons in active concert and participation with them, from enforcing or taking any steps in any way toward implementing, and from putting into effect, as to the class, the system of "maximum monthly grants" and schedules of need prescribed by New York Social Services Law § 131-a, added by Laws Ch. 184, March 31, 1969,

as amended by Laws Ch. 411 May 9, 1969, on the ground that said grants and schedules are in violation of and inconsonant with the requirements of the federal Social Security Act and regulations promulgated thereunder.

2. Enter a declaratory judgment holding that New York Social Services Law § 131-a and the Rules, Regulations, Bulletins and Standards promulgated thereunder denies plaintiffs residing in the Greater New York Area but outside the City of New York rights, privileges and immunities secured by the Fourteenth Amendment to the Constitution of the United States, the federal Social Security Act and regulations promulgated thereunder, insofar as the said Section 131-a provides greater benefits for persons in New York City than to persons outside the City of New York but in the Greater New York Area despite the similarity in needs and cost of living for the two groups of recipients, and otherwise invidiously discriminates against plaintiffs and their class.

4. (a) Allow plaintiffs their costs herein and grant them and all other persons similarly situated such additional or alternative relief as the Court may deem to be just and appropriate.

Respectfully submitted,

Lee A. Albert
Henry A. Freedman
Sylvia Ann Law
Lucy Katz
Center on Social Welfare
Policy and Law.

Allen Redlich
Attorney for Plaintiffs
Nassau County Law
Services Committee, Inc.

Avram Weisberger
Attorney for Plaintiffs
Legal Aid Society of
Westchester Co.

Order to Show Cause—Re: Preliminary and Permanent Injunctions and Convening of a Statutory Three-Judge Court.

LET defendants show cause in Courtroom No. 506 of the United States Courthouse, Foley Square, New York, New York, on the 1st day of July, 1969, at 10:00 A.M. or as soon thereafter as counsel may be heard why an order should not issue or the Court take such other action as shall grant the plaintiffs herein the following relief:

(1) A preliminary and permanent injunction restraining and enjoining defendant Wyman, his successors in office, agents and employees, and all persons in active concert and participation with them, from taking any steps toward implementing and from putting into effect the system of "maximum monthly grants" and schedules of need prescribed by New York Social Services Law § 131-a, added by Laws Ch. 184, March 31, 1969, as amended, May 2, 1969, Laws Ch. 411, under the Aid to the Aged, Blind or Disabled program.

(2) The convening of a statutory court of three judges for the purpose of hearing and determining this application for a preliminary and permanent injunction in accordance with the provisions of Title 28, United States Code, §§ 2281 and 2284.

(3) An order determining that this action may properly proceed as a class action pursuant to Rule 23 of the Federal Rules of Civil Procedure.

LET the defendants further show cause why a temporary restraining order pursuant to Title 28 United States Code, § 2284 should not issue restraining the defendant, his successors in office, agents and employees, and all persons in active concert and participation with them, from taking any steps toward implementing and from putting into effect

the system of "maximum monthly grants" and schedules of need prescribed by New York Social Services Law § 131-a, as amended, pending the hearing and determination of plaintiffs' motion for a preliminary and permanent injunction by a three-judge court convened pursuant to Title 28, United States Code, § 2281 and § 2284.

Plaintiffs seek this temporary restraining order and preliminary and permanent injunction on the grounds that:

(1) Implementation of § 131-a, as amended, will result in a denial of the equal protection of the laws as guaranteed by the Fourteenth Amendment to the Constitution of the United States and in a violation of § 1602(a)(1) of the Federal Social Security Act, 42 U.S.C. § 302(a)(1), and related sections and regulations promulgated thereunder.

(2) Plaintiffs are suffering, and are threatened with, irreparable injury in that as of July 1, 1969, the effective date of § 131-a, they will be without means to provide for themselves the basic necessities of food, clothing and essential medical care, as alleged in the annexed complaint and affidavits of Edna Rothstein dated June 11, 1969, Sylvia Miller, dated June 11, 1969, and Henrietta Batson, dated June 20, 1969. It is also alleged in the annexed affidavit of Allen Redlich, attorney for plaintiffs, dated June 20, 1969, that immediate action is required prior to implementation of § 131-a, on July 1, 1969, as mandated in said statute.

(3) The issuance of a temporary restraining order and preliminary injunction will not cause undue inconvenience or loss to the defendants, but will prevent irreparable injury to the plaintiffs.

(4) Plaintiffs have no adequate remedy at law, as set forth more fully in the complaint and the affidavits of

Order to Show Cause—Re: Preliminary and Permanent Injunctions and Convening of a Statutory Three-Judge Court.

Edna Rothstein, Sylvia Miller, Henrietta Batson and Allen Redlich attached hereto.

IT IS ORDERED that service of this Order on defendants at their New York City office at 270 Broadway, New York, New York, or upon the Attorney General of the State of New York, at his office at 80 Centre Street, New York, New York, on or before the 26th day of June, 1969, be deemed sufficient.

IT IS FURTHER ORDERED that service of this Order may be by any of the attorneys for plaintiffs in this action.

At the United States Courthouse, Foley Square, New York, this 25th day of June, 1969, at

s/ MORRIS LASKER,
United States District Judge.

Affidavit of Allen Redlich, in Support of Order to Show Cause.

ALLEN REDLICH, being duly sworn, deposes and says:

1. I reside at 16 Westminster Road, Syosset, New York.

2. I am an attorney with Nassau County Law Services Committee, Inc., located at 150 Old Country Road, Mineola, New York.

3. I am one of the attorneys for the plaintiffs herein and submit this affidavit in support of plaintiffs' motion for a Temporary Restraining Order and immediate convening of a three-judge District Court pursuant to 28 U.S.C. § 2281 and § 2284.

4. Plaintiffs seek a declaratory judgment that New York Social Services Law § 131, as amended, Laws Ch. 184 March 31, 1969, and § 131-a, added Laws, Ch. 184, March 31, 1969, as amended, Laws Ch. 411, May 2, 1969, violate the Social Security Act § 302(a)(1) and the regulations promulgated thereunder, specifically 45 CFR 5233.20, 34 Fed. Reg. 1394 and Handbook of Public Assistance, Pt. II § 4000 *et seq.* and the Fourteenth Amendment to the Constitution of the United States insofar as said sections have the effect of denying equal protection of the law to plaintiffs by affording to them a different and lesser quantum of public assistance than is afforded to others similarly situated solely because of their place of residence.

5. Plaintiffs assert that the Social Security Act compels the State of New York, a recipient of funds thereunder, to distribute public assistance under the Aged, Blind or Disabled Programs, "uniformly;" that differentials are permissible only where there is proven factual justification based on differences in cost; that in fact the cost of living in affluent suburban Nassau and Westchester Counties is

as high and in some instances demonstrably higher than the cost of living in neighboring New York City; and that accordingly, implementation of the statutory scheme violates plaintiffs' rights under the Fourteenth Amendment of the Constitution and under the Social Security Act.

6. On March 31, 1969, § 131-a of the New York Social Services Law was enacted. It substituted legislative standards of assistance for those currently in effect. It mandated that assistance be provided, effective July 1, 1969, exclusive of rent and utilities, as promulgated by the State Department of Social Services, on one level in New York City and at a lower level outside the city, as follows:

	Number of Persons in Household							
	1	2	3	4	5	6	7	Each additional
New York City	70	116	162	208	254	297	340	43
Outside New York City	60	101	142	183	224	257	290	33

7. As appears more fully in plaintiffs' Memorandum of Law submitted herewith, these standards alter substantially the structure of assistance payments now existing in New York State. Residents of New York City and of Westchester, Nassau and other metropolitan area counties who were in need received the same amounts of public assistance, based on a determination that living costs were the same for all those counties and the City of New York. The new schedules mandated grants for suburban recipients far below those available to New York City residents,

Affidavit of Allen Redlich, in Support of Order to Show Cause.

8. On May 2, 1969, the Legislature amended the new §131-a to permit the State Commissioner of Social Services to authorize higher or lower schedules in areas where costs of living varied from the costs reflected in the legislative schedules. No grants can exceed those established by the Legislature for New York City.

9. On or about June 5, 1969, defendant Wyman, the Commissioner of the New York State Department of Social Services promulgated a new schedule of grants, under which Nassau and Westchester recipients of Aid to the Aged, Blind or Disabled (and certain other suburban residents) will receive assistance as follows:

Number of Persons in Household							
1	2	3	4	5	6	7	Each additional
$65	$107	$149	$191	$233	$270	$307	$37

See Appendix to complaint herein.

10. These amounts remain significantly below New York City standards and below living costs in the counties where they are applicable.

11. Plaintiffs will submit proof pertinent to the claim of equal treatment on the following matters:

1) State standards of assistance currently in effect establishing that at the present time the same standards apply in New York City and in Nassau and Westchester counties. Indeed, the only difference statewide is utility costs.

2) Handbooks of the New York City and Nassau and Westchester County Departments of Social Services with

price guidelines indicating, if anything, that costs are higher in Nassau and Westchester counties.

3) A statistical analysis of public assistance expenditures which indicate that the monthly aid to each recipient as of October 1968 was significantly higher in Nassau and Westchester counties than the monthly aid to recipients in New York City.

4) A detailed analysis of transportation costs by the Director of the Nassau County Planning Commission establishing the high cost of transportation in Nassau County. (See affidavit of John Burdis attached to plaintiffs' Memorandum of Law.)

5) The fact that the Labor Department's Consumer Price Index treats the entire metropolitan area as one entity and does not even attempt to assess costs within that area. This is, of course, because both areas are serviced by the same major retail outlets, department stores, supermarkets, etc., who advertise and charge similar prices throughout the metropolitan area. This, together with the mobility of most of the urban-suburban population precludes price variations of any significance within the area.

12. Plaintiffs are recipients of aid under the federally reimbursed categorical assistance programs of Aid to the Aged, Aid to the Blind, and Aid to the Disabled. Plaintiff Edna Rothstein currently receives $85.90 a month in Aid to the Aged. Plaintiff Sylvia Miller receives $520.33 in Aid to the Disabled. Plaintiff Henrietta Batson receives $166.70 in Aid to the Blind. As of July 1, 1969, all will receive the flat sum of $65 per month, exclusive of rent and utilities. Similarly situated residents of New York City will receive $70.00.

Affidavit of Allen Redlich, in Support of Order to Show Cause.

13. These plaintiffs represent the class of recipients receiving Aid to the Aged, Blind or Disabled and residing in Nassau and Westchester counties.

14. The statutory scheme mandating these cutbacks will have disastrous implications for plaintiffs and their class, since they will lose a large proportion of their basic grants, plus vital special allowances for items such as medically required diets, and telephones, housekeepers and special transportation costs for the aged and ill. Plaintiffs are further denied that minimal assistance available in New York City, though their financial needs are as great as or greater than those of persons similarly situated in New York City.

15. Plaintiffs face very severe health hazards if their grants are reduced as scheduled under § 131-a. All will suffer irreparable injury if implementation of that statute is not enjoined.

17. Plaintiffs' claims under the Social Security Act and the Constitution are substantial. Defendants cannot demonstrate any justification for departing from the previous uniformity between New York City and suburban grant levels, nor for arbitrarily classifying Nassau and Westchester recipients as entitled to less than their New York City counterparts.

(Sworn to by Allen Redlich, June 24, 1969.)

Affidavit of Edna Rothstein.

EDNA ROTHSTEIN, being duly sworn deposes and says:

1. I reside at 65 Lincoln Boulevard, Long Beach, Long Island, New York, am over 65 years of age and am a recipient of Old Age Assistance and have been such for many years.

2. I am presently receiving from the Department of Social Services of the County of Nassau the sum of $85.80 per month in addition to the rent of my present housing accommodations.

3. My entitlement is computed as follows: Basic needs $66.80, an additional allowance of $8.00 because I am aged, an allowance of $4.45 for a telephone, an allowance of $4.45 for transportation for shopping made necessary by my physical condition, and an allowance of $2.10 because it is necessary for me to purchase extra clothing.

4. In addition to the allowance of $85.80 that I receive I have a request in for an additional allowance for a special diet which will be decided at a fair hearing that I have asked for. I presently receive medical care at Meadowbrook Hospital in East Meadow, Long Island, New York and am supplied transportation by the Department of Social Services on the frequent occasions when I must go to the hospital.

5. I am advised that on July 1, 1982 it is the intention of the defendants to reduce my allowance each month to $83.80. I will, therefore, suffer a loss of $2.00 exclusive of any loss I would suffer should my request for a special diet be granted. I am also unsure as to whether I will continue to be furnished transportation to Meadowbrook hospital when needed.

6. Should the cut in my allowance go through I will be unable to continue to subsist. I have difficulty in making ends meet at the present time and cannot conceive of continuing to maintain myself should the decrease of approximately 25% of my income actually be effectuated.

(Sworn to by Mrs. Edna Rothstein, June 11, 1969.)

Affidavit of Sylvia Miller.

Sylvia Miller being duly sworn deposes and says:

1. I reside at 76 Indiana Avenue, Long Beach, New York. I am 49 years of age and am a recipient of Aid to the Disabled which I receive from the Nassau County Department of Social Services.

2. At the present time I reside with my husband, Robert Miller, and my son, Robert T. Miller, who are recipients of home relief. My husband is employed but because of the medical condition of myself and my son we are unable to make ends meet on his salary and therefore are eligible for and have been receiving public assistance.

3. As of May 1, 1969 my budget as a recipient of Aid to the Disabled was as follows:

Basic needs (2 shares)	$ [illegible]
Home	4.45
AA/DD allowance	[illegible]
Special diet	[illegible]
Home maker (pct)	[illegible]
Social Security for employer	[illegible]
Social Security for employee	[illegible]
Fund for homemaker	[illegible]
	$730.59 Total

4. As of May 20, 1969 the Department of Social Services notified me that the allowance for a homemaker would be reduced to $80 per week or $346.66 per month. I dispute this reduction and this matter is presently being handled by my attorneys.

5. The reason that I need a homemaker is because I am presently confined to a wheelchair, am under constant medical attention because of a cardiac condition, numerous other conditions which have required surgery and because of medical conditions as yet undiagnosed.

6. I am advised that on July 1, 1969 I will receive in excess of rent only the sum of $65.00 per month. I have been able to obtain no assurance that the homemaker service will be continued.

7. I am also advised that the amounts provided for my husband and son will also be reduced; and that they will be unable to obtain any grants of assistance for their special needs.

8. I will be irreparably harmed should the new welfare law go into effect on July 1, 1969. I am unable to cope with the problems of life without the special attentions of a homemaker. At the very least my husband will be forced to leave his employment to stay home and care for me.

9. I urge this court to grant relief as requested.

(Sworn to by Sylvia Miller, June 11, 1969.)

Affidavit of Henrietta Batson.

HENRIETTA BATSON, being duly sworn, deposes and says:

FIRST: That I am Sixty-eight (68) years of age and am totally blind. I have been partially blind since 1950 and totally blind since 1966. I also suffer from coronary insufficiency and chronic bronchitis.

SECOND: That I live alone at 49 North Ninth Avenue, Mount Vernon, New York, and do not have any relatives in that city.

THIRD: That my June 1969 budget from the Mount Vernon office of the Westchester County Department of Social Services is as follows:

Pre-added allowance	$ 66.00
Shelter	108.00
Aid to the Blind (Group II)	12.00
Allowance for AB	8.00
Special Diet	11.35
Telephone	6.60
Food delivery	4.30
Transportation for Housekeeper	2.17
Housekeeper	32.47
Dog allowance (food)	12.00
Aid in Reading	8.66
Housekeeper lunch	1.95
Total	$273.50

Inasmuch as I receive Social Security benefits in the amount of One Hundred Six Dollars and Eighty Cents ($106.80), the amount of money which the Department of Social Services has given me for the month of June 1969

is One Hundred Sixty-six Dollars and Seventy Cents ($166.70).

Fourth: A) That I need a special grant for aid to the blind and an allowance for AB totaling Twenty Dollars ($20) to enable me to pay for a guide so that I might be able to leave my apartment to go shopping for personal effects or to visit acquaintances and to purchase meals for myself while I am away from my apartment and to provide transportation so that I can reach my destination.

B) That I need the special grant for a special salt free, fat free beef diet as I have a coronary insufficiency and this diet has been prescribed by my physician, Dr. Lincoln Stulik of 103 Stevens Avenue, Mount Vernon, New York.

C) That I need the special allowance for a telephone as I live alone, do not have any relatives living nearby, and must have a telephone in case of an emergency to call for help.

D) That I need the special allowance for food delivery as I live on the second floor. There is no elevator and because of my heart condition it is impossible for me to carry up the stairs the food items which I purchase. The store from which I make all my purchases delivers once a week and charges One Dollar per delivery.

E) That I need the special grant for aid in reading to enable me to hire a person for two hours a week to read my mail and to assist me in writing for records containing books and magazines so that I might keep my mind alert.

F) That I need the special grant for a housekeeper to clean my apartment as my blindness prevents me from cleaning up myself.

G) That I need the special grant for housekeeper lunch to enable me to provide lunch for the housekeeper who

comes once a week to clean my apartment. The housekeeper will not clean if I do not provide lunch for her.

H) That I have a seeing eye dog and I need the special allowance for food to feed him.

FIFTH: That on or about June 6th, 1969, Miss Patricia Doyle, my caseworker at the Mount Vernon office of the Westchester County Department of Social Services, telephoned me and notified me that as of July 1969 my budget would be limited to the following:

Pre-added allowance	$ 65.00
Shelter	108.00
Total	$173.00

Inasmuch as I will receive Social Security benefits of One Hundred Six Dollars and Eighty Cents ($106.80), I have been told that I will receive a grant from the Westchester County Department of Social Services of Sixty-six Dollars and Twenty Cents ($66.20) and that Thirty-six Dollars and Sixty Cents will be issued directly to the housekeeper to cover her wages, transportation and lunch.

SIXTH: That I will be irreparably harmed should the new Social Services law go into effect.

A) That I will be unable to leave my apartment without the extra aid to the blind which enables me to hire a guide to allow me to safely walk the streets and arrive safely at my destination. Without which, I will be unable to visit acquaintances or make purchases for personal effects.

B) That I will live in constant fear of an emergency as I will be totally cut off from the world without a telephone.

C) That I will be unable to exist without having food delivered to me. Due to my heart condition, I cannot carry items up a flight of stairs myself.

D) That I will be unable to cope with life without having a reader. Without a reader, I will be totally cut off from the world and I will not be able to read my mail or to apply for books and records to keep myself mentally alert. I feel that I will deteriorate mentally.

E) That I will be unable to exist in my apartment without the aid of my seeing eye dog if I am not given funds with which to purchase food for him.

SEVENTH: That the above affidavit was read aloud to me on June 20th, 1969, in my apartment by Avram Weisberger, Esq., and I acknowledge that all statements contained therein are true.

Dated: June 20th, 1969, Mount Vernon, New York.

(Sworn to by Henrietta Batson, June 20, 1969.)

Decision and Order Convening the Three-Judge Court (Motley, J.).

Plaintiffs seek preliminary and permanent injunctions and declaratory relief against the "maximum monthly grants" and schedules of need prescribed by New York Social Services Law § 131-a, added by Laws Ch. 184, March 31, 1969, as amended by Laws Ch. 411, May 9, 1969, in connection with federally assisted programs of aid to the aged, blind and disabled. Plaintiffs sue on behalf of a class composed of aged, blind and disabled persons aided by these programs and resident in suburban counties outside the New York City limits, including Westchester County which is within the Southern District of New York.

Plaintiffs claim that the new provisions of the Social Services Law irrationally and invidiously discriminate against members of their class in violation of the Social Security Act, 42 U.S.C. § 301 et seq. and the Fourteenth Amendment to the United States Constitution because grants under these programs in the counties of plaintiffs' residence are lower than equivalent grants in New York City despite data indicating that costs of living in plaintiffs' counties are at least as high as in New York City.

The action is before this court on plaintiffs' motion to convene a three-judge court pursuant to 28 U.S.C. § 2281 et seq. Plaintiffs claim that their motion for a preliminary injunction must be heard and determined by a three-judge court because of the federal constitutional issues raised. Only a three-judge court may enjoin the enforcement or execution of a state statute as unconstitutional, and such a court must be convened where the constitutional issue or issues are not wholly insubstantial. *Idlewild Bon Voyage Liquor Corp.* v. *Epstein*, 370 U. S. 713 (1962).

An action similar to this was brought recently in the Eastern District of New York, making identical claims (and others not here relevant) with respect to these new Social Services Law provisions *prior to* their May 9

amendment in connection with the aid program for dependent children, *Rosado* v. *Wyman*, 69 Civ. 355. The constitutional claims were held not insubstantial by the single District Judge, *Rosado* v. *Wyman*, —— F. Supp. —— (E.D.N.Y., April 24, 1969), and by the three-judge court when convened, *Rosado* v. *Wyman*, —— F. Supp. —— (E.D.N.Y., May 12, 1969).

However, the New York Legislature amended the new provisions on May 9, 1969, to allow the Social Services Commissioner and local social services officials to increase benefits in counties outside of New York City up to the New York City level. The three-judge court then held the constitutional attack moot and not ripe for adjudication by that court "until there has been an opportunity for action by state officials and until the matter comes before this Court in an appropriate proceeding," *Rosado* v. *Wyman*, *supra*, at ——— (May 12, 1969).

Plaintiffs now claim that the defendant Commissioner has utilized the opportunity given him by that three-judge court in that he has promulgated a new schedule of grants in plaintiffs' counties. However, it is alleged that this new schedule provides benefits still well below the New York City level without rational justification and that the constitutional issues are now ripe for adjudication.

The court agrees, and, accordingly, the motion to convene a three-judge court is granted, and the case is referred herewith to the Chief Judge of the Circuit. 28 U.S.C. § 2284.

Dated: New York, New York, July 7, 1969.

So Ordered:

Constance Baker Motley

Constance Baker Motley

U. S. D. J.

Answer.

Defendants, by their attorney, Louis J. Lefkowitz, Attorney General of the State of New York, as and for an answer to the complaint herein, respectfully allege:

As to plaintiffs' statement of claim:

First: Deny knowledge or information sufficient to form a belief as to each and every allegation set forth in paragraph "11" and in the second sentence of paragraph "3", and in the first sentence of paragraph "8(c)".

Second: Deny each and every allegation set forth in paragraph "12" and paragraph "10(b)".

Third: Deny each and every allegation set forth in paragraph "9", except admit that Social Services Law, § 131-a abolished special grants for welfare recipients.

As to plaintiffs' first cause of action

Fourth: Deny each and every allegation set forth in paragraphs "1", "6", "7" and "8", and in the first sentence of paragraph "5" thereof.

Fifth: Deny knowledge or information sufficient to form a belief as to each and every allegation set forth in paragraph "4" and in the fourth sentence of paragraph "5" thereof.

As to plaintiffs' second cause of action

Sixth: Deny each and every allegation set forth in paragraph "1" thereof.

Answer.

As to plaintiffs' third cause of action

Seventh: Deny each and every allegation set forth in paragraph "2" thereof.

As to plaintiffs' fourth cause of action

Eighth: Deny each and every allegation set forth in paragraphs "1" and "2" thereof.

As and for a first complete defense, defendants allege:

Ninth: That this Court lacks jurisdiction over the subject matter herein.

As and for a second complete defense, defendants allege:

Tenth: That in an action instituted in the United States District Court, Eastern Dristict of New York, entitled *Rosado* v. *Wyman*, 69 Civil 355, alleging the precise question sought to be raised here, a three-judge court was convened by order (Weinstein, J.), dated April 24, 1969, and that three-judge court dissolved itself by order dated May 12, 1969 holding this question moot and not ripe for adjudication since Social Services Law § 131-a had been amended so as to permit county social services administrators to apply for an increase in welfare payment levels up to and including the New York City rate set forth in the statute. The Court held that this provided an expeditious state remedy for any person aggrieved through an Article 78 proceeding to compel such action by a local Social Services Department, and that therefore the issues raised were unripe for determination in the Federal

Courts. The order dissolving that three-judge court is presently on appeal to the United States Court of Appeals, Second Circuit.

ELEVENTH: That this decision is binding, or if not binding, highly persuasive precedent holding that the issues sought to be litigated here are unripe for adjudication.

AS AND FOR A THIRD COMPLETE DEFENSE, DEFENDANTS ALLEGE:

TWELFTH: That the very issue of the conformity of § 131-a to federal regulations, sought to be raised here, is presently being considered in an administrative proceeding within the United States Department of Health, Education and Welfare.

THIRTEENTH: That said Department of Health, Education and Welfare has primary jurisdiction over this issue and that this Court thereof lacks jurisdiction over the instant action.

AS AND FOR A FOURTH COMPLETE DEFENSE, DEFENDANTS ALLEGE:

FOURTEENTH: That a rational basis exists for the disparity in maximum monthly grants and allowances as between New York City and the remainder of the State of New York.

WHEREFORE, defendants respectfully request judgment dismissing the complaint.

Louis J. Lefkowitz,
Attorney General of the
State of New York,
Attorney for Defendants

Deposition of George K. Wyman, Taken by the Plaintiffs

(It was agreed that the signature of the witness to the deposition is waived.)

Proceedings of Hearings N. Y. Housing Authority by the Housing Officials, having been first duly sworn by the Notary Public, testified as follows:

Examination by Mr. Allport.

Q. Mr. Wyman, before Section 121-a of the Social Services Law, there was a division regarding grant levels of the State into three districts, is that correct? A. That is correct.

Q. Those districts were labelled SA-1, SA-2 and SA-3? A. Correct.

Q. And for how long did these divisions exist, to your knowledge? A. For the entire time that I have been in the Commissioner's office, to my knowledge.

Q. SA-1 was comprised of New York City and what other counties? A. Rockland, Putnam, Westchester, Nassau and Suffolk Counties.

Q. And the amounts in these schedules in SA-1, -2 and -3 were formulated by your department? A. That is correct.

Q. In accordance with the standard budget system amounts to provide a standard of living consistent with health and decency? A. Yes, meet Federal requirements.

Q. And there were differences between the amounts in SA-1, -2 and -3, is that correct? A. That is right.

Q. And were those differences based upon a desire to give certain people more money than other people? A. On the basis of the cost of living in those areas, a variation due to the variation cost between those geographic sections of the State.

Q. The differences between those were entirely due to utilities costs? A. Yes.

Q. What is considered to utilities? A. Electricity, water and, if that is provided, for cooking purposes, things normally considered utilities.

Q. And hence that reflected an element of giving people

the exact same amount of purchasing power, is that correct? A. The content would be the same, yes.

Q. Did your department undertake an analysis of the cost of utilities in the various counties? A. Annually.

Q. Annually. And did you examine the cost of utilities in each and every county in the State of New York? A. On the basis of the utilities service areas. Different companies serve a number of counties and so their rates would be the same in these areas. The rate would be the same for several counties.

Q. Were the costs of other items ascertained to correlate to the amounts? A. Annually.

Q. Can you explain how the cost of food in the various counties were ascertained? (5) A. By using the U. S. Department of Agriculture minimum adequate budget standards and pricing needs in the various parts of the state both in chain stores and in neighborhood stores.

Q. In what parts of the state were they priced? A. I can't give you the precise.

Q. Would it refresh your recollection if I say New York City and Buffalo? A. At least those two, yes.

Q. Does it refresh your recollection if I say not rural counties or, indeed, not other places but New York City and Buffalo? A. No.

Q. Does it refresh your recollection if I say that the food prices were taken by averaging the prices in New York City and Buffalo and only those two places? A. No.

Q. It is your impression that food prices were not determined in counties by county basis? A. That is correct.

Q. A certain amount of averaging was accordingly done? A. Oh, certainly.

(6) Q. And the food component of the grant levels in SA-1, 2 and 3 was the same for all counties, is that correct? A. That is correct.

Q. So that food prices in New York City and food prices

in Duluth were deemed to be the same in computing for grants? A. As far as the content is concerned, yes.

Q. The amount? A. Yes.

Q. And was there a pricing of other items contained in the component items of the grant? A. Yes; clothing, for example.

Q. And on what basis was the pricing of clothing done? A. Same basis. In other words.

Q. Not county by county? A. No, but obviously certain items of clothing are needed everywhere in the state and those we found, generally speaking, were comparable costs regardless of where the people lived.

Q. Would the same be true for furniture? A. Oh, yes.

Q. And the same would be true for (7) transportation? A. Not necessarily.

Q. Was it true we are now talking of SA 1, 2 and 3 before March, 1967? A. Yes.

Q. Was the amount of transportation deemed to be the same throughout the state? A. No.

Q. So that another element of variation between SA 1, 2 and 3 were transportation in addition to utilities? A. Most certainly.

Q. What other elements were not deemed to be uniform throughout the state and accordingly, affected the amounts of schedules 1, 2 and 3? A. Rent and fuel for heating.

Q. And were there other elements? A. Any other elements would be considered as special need items and they would reflect whatever the actual cost of the item might represent. For example, the necessity for someone to travel some distance to a hospital for clinic purposes.

Q. There were items of special need that pursuant to schedules drawn up by the local social (8) service district? A. If there had a local equivalent that received the approval of the State Department of Social Services, then that was used.

Deposition of George K. Wyman, Taken by the Plaintiffs.

Q. So that the local schedules that did exist for items of clothing, for example, or transportation in New York City, Nassau and Westchester were submitted to you? A. The items of basic need that we talked about that are shown on the SCA-1, 2 and 3 are uniform. I am talking about the variations in the special need items.

Q. Items of furniture and clothing were special need items? A. Yes, some items of clothing, yes; not all.

Q. And some items of furniture? A. And some items of furniture.

Q. And you are aware that the New York City Department drew up an extensive list with prices of items of clothing and furniture? A. That's right.

Q. And that was done also by the Westchester County Department? (9) A. I believe so.

Q. And the Nassau County Department, and they were submitted to your department? A. Yes.

Q. All the items reflected in them were dealt with previously as items of special grants? A. Right, as far as I know.

Q. Are you aware that in that list every conceivable item of clothing for an infant of one month old to an adult is included, in the list in New York City? A. I haven't seen that schedule.

Q. Is it conceivable that the list would be comprehensive? A. Yes.

Q. Did someone in your department examine these lists to see that they conformed to any state standard? A. I assume that did.

Q. Would the policy of your department be for them to examine it? A. In order for us to give approval, naturally they would have to be examined and approval granted. So I assume this was done.

(10) Q. And if these lists were used to compute special grants by the various local social services districts, presumably they were approved? A. Oh, certainly.

Q. Looking to the schedules prior to 131-a, SA-1, 2, 3, they reflect differences based on the age of the oldest child in the family, is that correct? A. That is correct. There are nine age groupings, if I recall correctly.

Q. Why do they so reflect that? A. Because it was felt that the food or the clothing requirements of children at various stages of growth required these considerations.

Q. Was the theory that older children needed greater amounts of food or greater amounts or more expensive clothing? A. Oh, yes.

Q. But there is a set amount for adults in each of the four categorical assistance programs? A. It is the same amount, yes.

Q. In regard to the differences between SA-1, 2 and 3, are you aware of approximately how much they were; the differences between the amount for one adult, for example, in SA-1, 2 and 3? (11) A. I can't—I don't recall.

Q. I submit to you what is labelled SA-1, 2, and 3 and ask you to examine it (handing).

Mr. Hoffman: I would like to make it clear that this is a former schedule.

Mr. Albert: I think it is clear.

Q. Are these schedules SA-1, 2 and 3 before you? A. Yes.

Are these the most recent ones prior to that date? I don't think they are. This is dated June, 1963.

(Discussion off the record.)

Q. You now have before you a copy of schedules SA-1, 2 and 3? A. Right.

Q. And the difference in the one adult category between one, two and three, you have how many dollars? A. $3 each for the adult.

Q. In each, going from one schedule to the next? A. Yes, starting with 60, 63 and 66.

Q. And using the amounts for two-person and (12) three-person families with the oldest child five years and under, what differences between SA 1, 2 and 3 are reflected in two-person families? A. That appears also to be $3 each; 88, 91 and 94.

Q. And three-person families, the same category? A. Here we have $3 and $2; that is 105 and 107.

Mr. Hoffman: The question was three-person families, was it not?

Mr. Albert: That is correct.

A. I stand corrected.

It is $3 each for the three-person family.

Q. Let me now skip to the six-person family and ask what the difference is there? A. It is $4 in the one case and $3 in the other. Is that correct? 204, 200 and 197.

Q. And now to the eight-person family regarding the same differences, please? A. Eight-person is $3 and $4.

Q. Would that generally be true if we went to other categories of oldest children respectively and went through the same series with oldest child (13) 14, for example? A. I presume so, because the schedule is generally related across the board.

Q. It is accurate to say that the differences between SA 1 and SA 2 range from $2 to $4 and similarly between SA 2 and SA 3? A. That's right.

Q. Regardless of size of family? A. Regardless of size of family.

Q. Those differences are accounted for by, it was your testimony, I believe, relative differences in the cost of utilities and transportation and that's all? A. That is correct.

Q. How can it be explained that those differences remain the same in a one-person family and a nine-person family if they are accounted for by utilities and transportation?

A. Because in utilities you don't heat people, for example, or you don't light people. You light rooms and you heat rooms, and on the basis of the size of the living facility, you have variations in cost of the utilities, not in the cost of people who occupy them.

(14) Q. Do your rent schedules reflect different rents for the one-person family and the nine-person family or are they the same? A. They are different, depending upon the size of the family.

Q. Is the assumption there the size of the apartment for a nine-person family must be considerably larger than a one-person family? A. None nine times larger.

Q. Considerably, I said. A. Considerably, yes.

Q. And the rent must be considerably higher? A. Naturally.

Q. Does the experience reflect these utilities would be the same? A. No.

Q. Transportation is used by people? A. Yes.

Q. And the transportation differences between counties for nine people is no greater than the transportation differences between counties for one person? A. What is the extent of the component of transportation? If I stated earlier that this (15) simplified allowance schedule included transportation, that was in error.

Q. I am not talking of the simplified allowance schedule at all. I am speaking of SA 1, 2 and 3 before March, 1962.

I asked you what accounts for the differential between 1, 2 and 3. A. I said utilities.

Q. And then you said transportation.

Now, you may withdraw that, if you like. A. I should withdraw it because the simplified allowance schedule is stated here. Food, clothing, personal incidentals, household supplies, school expenses, utilities, laundry and sales taxes. No mention is made of transportation in here.

If I did so state, that was incorrect.

Mr. Hoffman: I would like to, for the record, interject an objection here on the grounds of relevancy. What is the relevancy to the cause of action alleged in your complaint insofar as these differences in appropriations for particular sizes of family? I thought the problem here was—

Mr. Albert: I think it will be the Commissioner's testimony, and the affidavit of Mr. (16) Chesebro reflects, the new schedules are in some way based upon these schedules.

A. That is correct.

Mr. Albert: Accordingly, the components and the reasons for the differences in these schedules reflect upon the differences in the new schedules.

Mr. Hoffman: Couldn't we just get to that point?

Mr. Albert: We will as soon as we establish what is in these schedules. We will be very rapid, if you let me.

Q. So that is a 1, 2 and 3 before me prior to March 1969, had no component for transportation at all? A. As far as I can see, no.

Q. How were people to transport themselves from one place to another? A. On a special needs basis.

Q. There was a special needs grant for every bus trip a person took? A. No.

Q. Was it not the special needs grant— A. If they established the need for regular (17) attendance at a clinic, something on a repetitive basis, then this was granted.

Q. If the transportation was neither medically related nor a trip to visit an institutionalized relative nor employ

ment, what special grant was available for ordinary transportation? A. I don't believe there was any. There wasn't any.

Q. It was assumed if one engaged in such a luxury, they would use this money to do so? A. That is correct, or the good will of some friend or neighbor would transport them.

Q. Now assuming you are correct that only utilities are involved in the differences between 1, 2 and 3, was there a study made by your department showing that utility variations—gas, electricity, water—remained fairly constant for the one-person and eight-person family? A. The differences?

Q. That is, the differences were based on an assumption that in counties in SA-3 utilities cost less per given quantity than utilities in counties in SA-1? A. Yes.

(18) Q. Has that changed in the past year? A. Not to my knowledge, although we haven't made any pricing of utilities since May of 1968, which is the date these schedules were priced out at.

Q. These schedules reflect your pricing at May 1968 in the cost of utilities? A. Right.

Q. And at that time was there a study made to sustain the proposition the differences in cost of utilities remained the same, constant, regardless of family size? A. Rounded to the nearest whole dollar, yes.

Q. There was a study made that utilities—let's be concrete.

In Allegheny County in SA-3; utilities cost less than in New York City, is that correct? A. Yes, in the western part of the state they cost less because they have natural gas available.

Q. And you mean by that water, gas and electricity, do you not? A. Essentially fuel for cooking.

Q. Fuel essentially for cooking? A. Is less in those

eight western counties (19) of the state because of the natural gas rates than in other parts of the state.

Q. And that difference— A. Is reflected in the schedules.

Q. To the extent of $6 a month for one person between New York City and Allegheny? A. Yes.

Q. That doesn't change with the number of people in the family? It does try one's common sense to understand how a $6 differential for one person in New York City and Allegheny remains a $6 differential for ten people in Allegheny and New York City. One does think that a ten-person family cooks a lot more than a one-person-family.

I am trying to save time and get at the root of my question.

Do you agree with that, Commissioner Wyman?

Mr. Chesebro: I think the Commissioner is confused. I am sure you want the record to show the truth.

Mr. Albert: You are not under oath.

Mr. Chesebro: I am speaking to you.

Mr. Albert: You are not speaking to me.

(50) You are speaking on the record. If you want to testify, he may put you on afterwards and I will allow this deposition to proceed to be expanded.

I am leaving the question in order to avoid delay.

Q. Turning to the study of May 1968, and the schedule in PA 1, it was found that Nassau, Suffolk, Monroe, Greene, Dutchess and Westchester and New York City had approximately the same utility costs? A. Right.

Q. And that is why they were grouped together? A. Yes.

Q. Turning to Section 131-a, enacted by the New York Legislature in March 1969, did your department consult with the legislature with regard to that legislation? A. At their request.

Deposition of [illegible]

Q. Did you undertake a cost study of items throughout the state to assist the legislature? A. No.

Q. Did you undertake any cost study? (2) A. No, other than the information contained in MV A 1, 2 and 3 at that time.

Q. You didn't review that — A. No.

Q. — or perform a new cost study before the March legislation?

I understand.

And the new schedules in 1981 do what, as enacted March 31, 1982? A. I assume you are familiar with the provisions of the statute. What it does is write into the statute the amount of maximum benefit representing the costs of living or the costs of care of people for New York City in dollar amounts, written into the statute.

Q. And for the rest of the state also? A. And for the rest of the state it authorizes the Commissioner to establish a rate and variance.

Q. We are talking of the original 181 as enacted March 31, prior to an amendment that came in May. A. That's correct.

Mr. Hoffman: Why is that relevant to this?

[illegible]

A. It also sets up an amount, dollar amount for each of the rest of the counties of the state.

Q. When you say "sets up," do you mean all of them together? A. Averaged New York City.

Q. In your knowledge, did the legislature undertake, without your consideration or testimony, a cost of living study of the component items throughout each county in New York State?

Mr. Hoffman: I object.

Q. To your knowledge? A. Not to my knowledge.

Q. And you were not asked to do that yourself, were you? A. No.

Q. I am going to back-up just for a moment. In August, 1968, there was a demonstration project initiated for New York City establishing a flat cyclical grant of $100 per person per year? A. Correct, except for persons living alone, I think it was, in home relief cases. They were the ones excluded from the cyclical payment, single persons. There was some group excluded. In any event, (23) the majority of the people were excluded.

Q. That would include people in the program of the Aid to the Aged, Blind or Disabled? A. That is correct.

Q. That cyclical grant was to cover what items of need? A. Cover clothing and furniture.

Q. In other words, the special grants continued? A. Yes.

Q. And those items outside of New York City were covered by what mechanism? A. On an individual special needs basis.

Q. Was that continued after the demonstration project in New York City? A. Right.

Q. Was the permission of H.E.W. to institute this project in New York City sought or obtained? A. Yes.

Q. Why? A. In order to provide a variation between what was being done on a standard basis across the state and what was being done as a project in New York City, plus the fact that additional Federal funds (24) were involved in the project.

Q. Would it help your recollection to say that the application for the grant specifically stated no additional funding was sought? A. You mean over and above what would otherwise have been expended?

Q. The representation was that this was not an application for additional Federal financing or participa-

tion and the cost of this would be approximately the cost of the former system now administered differently? A. I beg your pardon. You are correct.

Q. Did H.E.W. approve that? A. Yes, it did.

Q. For the reason it provided merely a different method of meeting need but not meeting different needs? A. That and the fact that we wanted to test the equity of providing this for all persons as a simplified method of meeting those needs.

Q. Turning to the two schedules contained in 131-a as originally enacted in March 1969, the schedule for upstate New York outside New York City was based on what previous schedule?

(25) Let me back up.

Is it not a fact that the method used was to do away with age differentials, was to take the mean age of the oldest child in each size family? A. Yes, but that wasn't your earlier question.

Q. No, I am just backing up. A. Yes, that is correct.

Q. What was turned to for upstate New York to reflect the amount in that size family? A. That would be SA-3.

Q. And that was the lowest upstate standard, is that correct? A. That is correct.

Q. And the amounts in the schedule for New York City reflect, based on the same methodology, what schedule? A. Reflects SA-1 plus an allowance for transportation.

Q. And how much for each person? How much is the allowance added to SA-1 for the New York City schedule? A. The median at 191 plus $17 for four. About $4 per month per person, roughly.

(26) Q. And the cyclical grant of $8.33 per person per month was abolished in this legislation? A. That is correct.

Q. And special grants throughout the state were abolished by this legislation? A. That is correct.

Q. And there is no $4 per person per month transportation amount added to the schedules for outside New York City? A. That is correct.

Q. And counties formerly on SA-1 aside from New York City were now transferred to SA-3? You just said that? A. Yes, March 31st.

Q. In this legislation; I talk now only of that legislation. A. That is correct.

Q. After this legislation was enacted, did you undertake a cost analysis of counties in New York State? A. No.

Q. What items of need are covered by 131-a as enacted? A. The statute specifies—

(27) Mr. Albert: If he doesn't know the answer, he can say he doesn't know the answer.

A. I don't recall its language, but it outlines what it is to cover.

Q. But based on your department's discussions with the legislature, is it your understanding it covers all items of need? A. Right.

In addition, we have made arrangements for the purchase of service.

Are you going to ask me questions about this?

Q. I might. Purchase of service of certain items that were formerly special grants? A. Yes.

Q. But not furniture or clothing? A. Not furniture or clothing nor transportation.

Q. All items of furniture and clothing and transportation are covered by the amounts set out in the legislative schedules as amended, is that correct? A. That's right.

Q. And in your opinion, are these schedules based, then, upon the cost to recipients purchasing (28) all their component items of need contained in the standard? A. As of May, 1968, when the pricing was done.

Q. Do you understand the reason for taking the counties formerly subsumed under SA-1, the New York standard, and moving them to SA-3 in 131-a, as enacted? A. No, I don't.

Q. That was not a recommendation of yours? A. No.

Q. After the enactment, you were authorized to approve a lowering of grant schedules upon application of the local social service department, is that correct, after enactment March 31st? A. Yes.

Q. Did you receive any? A. No.

Q. Did you undertake any studies preparatory to approving or not approve any such applications? A. No.

Q. Then in May, 1969—May 12th, to be precise, you received authorization yourself to increase or lower grants outside New York City? (29) A. The law was amended.

Q. That's correct. A. Yes.

Q. You were authorized, under this law, to do so, is that correct? A. Correct.

Q. Did you then undertake studies of living costs in the counties in New York State? A. Not as of that date.

Q. When did you begin to undertake such studies? A. We used the schedule already in existence based upon the May 1968 pricing to determine the levels to be established in the rest of the state.

Q. You made no separate, new study? A. No new study was undertaken.

Q. You used the data gathered for, and which underlay the schedules promulgated in May 1968? A. Yes.

Q. And based on that data, no counties were lowered? A. None.

Q. In using that data you made adjustments to various counties? (30) A. Based upon the schedules previously in effect or in effect at that time, yes.

Q. And you created a schedule now called SA-1, which includes all the counties previously on SA-1 with the ex-

ception of New York City? A. That is correct. Greene County, I guess, is not—SA-1 is New York City.

Q. I will restate the question. That schedule I just mentioned is now SA-2? A. That is right.

Q. Which includes all the counties with New York City previously on SA-1? A. That's right.

Q. And you also created a schedule called SA-3? A. Yes.

Q. Which contains all the counties previously on SA-2? A. Right.

Q. And you created a schedule called SA-4 which contains all the counties previously on SA-3? A. That's right.

Q. The differences now between New York City and the newly labelled SA-2 counties amount to approximately $5 a person?

(31). Mr. Hoffman: I think the schedules speak for themselves.

A. For one person, it is $5, that is correct, approximately so.

Q. So the smaller units are 4 and in the larger units they become 5 again? A. Yes.

Q. And this is a progressive difference accumulating with each person? A. Yes.

Q. That, of course, is unlike the former difference, the difference under the former schedule? A. That's right.

Q. —which is a flat amount established for the one person and the same for six persons; they are now graduated? A. That's right.

Q. And that would also be true of the new schedules 3 and 4? A. Yes.

Q. What were the materials in the May 1968 studies which dictated a very different result in the May 1968 schedules, which were not progressive, that told you to create these progressive differentials?

(32) Mr. Hoffman: I object to that question. Why is that relevant to the whole thrust of this lawsuit, which is the difference in levels between New York City and the surrounding areas?

Mr. Albert: The thrust of the lawsuit is the basis for those differentials in levels. They are either justifiable or not.

Mr. Hoffman: But what you are talking about is the difference in level between different size families. That's my understanding of your question. You are not talking about the county differentials, you are talking about the family size differentials.

Mr. Albert: The Commissioner has testified that the differences in his own promulgated schedules in June were based upon data gathered in May, 1968, that data having given rise to the data in May 1968.

Q. Is that right, Commissioner? A. Yes.

Mr. Albert: Accordingly, I am asking the Commissioner what is the data in those schedules which gave rise to the new differentials between the newly labeled schedules 1, 2, 3 and 4.

(33) Mr. Hoffman: Would you specify whether you mean—

Mr. Albert: I left out the progression.

Mr. Hoffman: Would you specify whether you mean the family size differential or the geographic differential? Which differential are you talking about?

Q. I am talking about the differentials, and you may specify, between SA-1, 2, 3 and 4 as you promulgated them in June 1969. What data in 1968 told you to set these figures and establish these differentials? A. Essentially the same data that was provided out of the May 1968 pric-

ing, geographic differentials being exactly what it had been before with relationship to costs of utilities representing the variations in geography.

Q. But the cost of utilities before reflected a constant figure regardless of size of family, the cost of utilities now reflects a progressive increase of a considerable sort in each respective schedule 2, 3 and 4? In other words, what led you to believe that utilities costs increased per person by an exact amount when in May 1968, you believed quite the (34) contrary?

Mr. Hoffman: I object to the relevancy of that question. What you are talking about is a differential between utility costs per person, and it seems to me that the lawsuit is saying that there is a geographic differential based on area.

Mr. Albert: SA-1, 2, 3-4 are geographic differentials be they per person or per family. I am asking for the basis of those differentials, which is at the heart of this lawsuit.

I don't think the question is at all irrelevant to ask why the same data in May 1968 gave rise to a uniform differential between each schedule regardless of size of family and now gives rise to a progressive differential depending wholly upon size of family between each schedule.

Q. Commissioner, are you able to answer the question?

Mr. Chesebro: I doubt he understands it.

Q. Commissioner, do you understand the question? A. I have heard your question.

Q. Do you understand it? I will try to (35) rephrase it. A. It is clear enough. The only answer I can give you is for simplicity of computation, to regularize the interval

between sizes of familes. For example, if you compared the previous schedule with the one now in effect, you will see variations that are not regular between different sizes of families. In an effort to simplify the single standard of assistance to be used in any particular geographical area of the state, we attempted to regularize, to the extent that we were able, these variations.

Q. So that the constant increase in differentials between 1, 2, 3 and 4—2, 3 and 4—I withdraw 1—is based on the desire to maintain a constant between the size of familes? A. An easily understood variable.

Q. It does not reflect the differences in cost of utilities between two-person and three-person families? A. Solely.

Q. New York City and the counties on SA-2 were found in May 1968 to have identical utility costs, relatively identical? A. Yes.

(36) Q. That's why they were grouped together? A. Right.

Q. Why is there now a 7 to 10 per cent differential between families in New York City and families in the counties formerly on SA-1? A. The essential difference is in the complexities of urban living in the City of New York, the necessity for provision of transportation items on a regular basis, the fact that there are cultural opportunities, readily available transportation, community center facilities, and clinic facilities in New York City that are not available in other areas of the state to the same extent, certainly not the components of the urban living requirements.

Q. Is it your testimony that the facilities of both cultural and social are more available for usage by people in New York City than in the surrounding counties? A. Yes.

Q. And you specified those facilities to be—let us be specific—museums? A. Yes.

Q. Would you specify the others again for me, please?

I don't have a list. (37) A. Clinic services, community center activities, religious opportunities, cultural in a general sense. All of these things contributing to life in New York City.

Q. And the additional grant of approximately $4, it was your testimony, although it is a bit more, is to cover the transportation to these facilities? A. Yes.

Q. As well as the expenses of them? A. Not necessarily. Some are free and some are charged.

Q. But it is to cover the use of them, put it that way? A. Yes.

Q. You mentioned clinics. Do you mean hospital clinics? A. It could include them. However, there are provisions in the medical assistance program to cover transportation on a regular basis for people who need medical clinic service.

Q. In establishing these differentials, did you make a study of the relative availability and usage of museums, clinics, community centers, religious centers, cultural institutions in New York (38) City, in Westchester County, in Nassau County and so on? A. No.

Q. Were there special grants available before for these items? A. In New York City?

Q. Correct. A. I don't believe so.

Q. In terms of the component budgetary studies leading up to the figures you promulgated in May, 1968, did you budget the figures for these items? A. No.

Q. So they were only to the extent the recipient could utilize a budget for other items to cover these items? A. That is correct.

Q. Did the legislature inform you in any manner that it was adding these items onto the New York City budget? A. No.

Q. Are you authorized to raise the surrounding counties outside New York City up to the New York City level? A. Yes.

(39) Q. And although all items of budgeted need in May 1968 cost the same, you did not, because of these additional items provided in 131-a for New York City, is that correct? A. I am not sure I understand.

Q. You exercised your discretionary power to increase grants for all the counties in the state recently and that power went as far as increasing grants up to the New York City maximum; you did not exercise that power for the former SA-1 counties up to that maximum at all? A. That's right.

Q. The reason you did not was because you deemed the group of facilities we talked about properly budgeted for New York City but not for surrounding counties? A. That is correct.

Q. You testified before the special grants for furniture and clothing were done away with, is that correct? A. Yes.

Q. And cyclical was done away with but replaced by about 50 per cent of its former amount albeit for different items? I speak now of the $4.25 (40) urban living cost given to New York City recipients only. A. I don't—

Q. The amount you referred to before was $4. It was given to the New York City people and not people outside New York City? A. That is correct.

Q. And that amount represents approximately the difference between— A. I had made that calculation.

Q. But it does, doesn't it? A. Yes, I guess it does.

Q. People in New York City could use that amount for items of clothing and furniture that they used to use a cyclical for, could they not? A. As a matter of fact, we have no limitation on what they use their money for. Any recipient of public assistance in New York State may use his grant in any way he sees fit as long as he does not misuse the money or mistreat his children.

Q. And by not using these facilities and using it all on furniture and clothing would not be a misuse? A. No.

(41) Q. It was assumed before 131-a and your regulations that the regular grant did wholly provide for items of clothing and furniture? A. Replacement of clothing and replacement of minor items of kitchen items, but not major pieces of furniture, not tables, desks or anything like that.

Q. It did not? A. No. These were special need items.

Q. Did it provide for special items of clothing? A. Yes.

Q. It was assumed it did? A. Yes.

Q. Why were you spending $100 per person on items of clothing and furniture? A. Major items. I said replacement items as against initial purchase. This makes a little distinction. In other words one having an overcoat it is presumed to have a life of so many years, and at the end of that time, an allowance having been granted, you can replace it. But if you don't have an overcoat and need it initially, then a special grant had to be made to clothe the person with the overcoat.

(42) Q. And what if the overcoat wore out three months after you went on welfare; a special grant would be necessary, would it not? A. It is a good deal like a person, I suppose, who has a fire and it's necessary to replace the item. If he uses his overcoat or it wears out, it is replaced.

Q. The criterion under your regulations for special grants for clothing was a demonstration of need for a major item of clothing, was it not? A. Yes.

Q. And not a demonstration of initial need but a demonstration of being without today, is that correct? A. In large measure, yes.

Q. And people used these grants in New York City and in the counties surrounding New York City, people applied for and obtained special grants? A. Oh, yes.

Q. Isn't it then likely that the present budget for New York City people, that part of it which represents the cyclical, may well be used for these items? A. There is no part of this represented in (43) the cyclical.

Q. The part in addition to the former SA-1 in New York City, which by definition, did not cover major items of furniture or clothing but was covered by a cyclical, the $4 or $4.25 added to SA-1 might be used for the need that was previously recognized as a cyclical? A. It can be used by the recipient in any fashion he sees fit.

Q. And recipients, though, in Nassau and Westchester have about the same need for furniture and clothing, do they not? A. I would assume so.

Q. And they don't have that amount available to do that? A. That's right.

Q. And is there any written evidence that the $4 urban living cost in New York City was meant to provide the items you listed before? Are there any—

Mr. Hoffman: Which items do you mean?

Mr. Albert: Museums, community centers, clinics, cultural facilities, religious facilities.

A. I answered before, saying no study had (34) been made for this.

Q. Is there any evidence this was the purpose of it? Had recipients been told, "You now have an urban living cost that is meant to cover these items for you"? A. No.

Q. "And we encourage you to utilize it that way"? A. No.

Q. Did you have communications with the Department of Health, Education and Welfare over differentiations within New York State? A. Oh, yes.

Q. Did you specify to the Department of Health, Education and Welfare that this amount added onto the New York City grant was for these items? A. Yes, we have submitted our plan material with that as the justification for it.

Q. How is it spelled out in those plan materials? Are you familiar with the plan materials? A. I have testified

along the lines of the bases upon which our submittal was made. We have not received approval of the plan material or disapproval.

Q. And when were those plan materials submitted (45) approximately? A. In June.

Q. There was an additional submission after March 31st before June, was there not? A. If you mean formal submission of plan material as contrasted with a submission of the Chapter and law, those are two different things. We did not submit formal plan material implementing the original legislation. We did after it was amended.

Q. That was covered by your letter of June 2nd? A. Yes. I believe that was the date. Do you have a copy of it?

Q. Yes. I apologize for its slight illegibility (handing). A. Yes, this is it.

Q. Can you read the paragraph underscored referring to the reason for the differentiation? A. "The initial point"—

Q. I'm sorry. Just read it to yourself. I don't mean for the record.

(Pause.)

Q. And in it you state that New York City, "being unique in size and complexity, results in special (46) requirements for transportation to use available services," is that correct? A. Yes. That's what I told you earlier.

Q. I am leading up to the next question. I am trying not to be repetitive, really.

The first item you mention as illustrative is a need to visit welfare centers. Are you familiar with the geographical districts of welfare centers in Nassau County? A. No, I am not.

Q. Are you familiar with the geographical districts and concentration of poor people in Nassau County? A. No.

Q. Then you are not aware of the distance they must travel to visit their welfare centers? A. No.

Deposition of George K. Wyman, Taken by the Plaintiffs.

Q. Are you aware of the transportation system in Nassau County? A. No.

Q. Are you aware that there are at least 17 separate franchised bus lines without interchange between them? A. No.

(47) Q. Are you aware that the minimum fee is a minimum of 25 cents?

Mr. Hoffman: I object. These are leading questions.

Q. Do recipients, to your knowledge, have a need for transportation to their welfare centers in Nassau County? A. I should imagine so, on occasion.

Q. Approximately the same as recipients in New York City? A. I don't know.

Q. No reason to believe otherwise? A. No reason to believe otherwise.

Q. Are you aware of recreational—the second illustration in this letter is recreational centers for the aged. Are you aware of recreational centers for the aged in Nassau County? A. No.

Q. Are there any, to your knowledge? A. I don't know of any.

Q. But you don't know that there are not? A. No.

Q. The same is true for Westchester County? A. Right.

(48) Q. There are more in New York City? A. Yes.

Q. Are you aware of day care centers for children in Nassau County? A. Yes.

Q. There are? A. There are some.

Q. And there are day care centers for children in Westchester County? A. Yes.

Q. And for those people who need to use them there are transportation costs involved? A. Yes.

Q. To the extent that their transportation systems cost more than New York City, the cost is more? A. That is correct.

Q. Are you aware of cultural recreational facilities in Nassau County and Westchester County? A. No.

Q. You think there are none? A. I just don't know of any.

Q. To the extent there are, people would use them as in New York City? (49) A. That's right.

Q. And transportation costs would be involved to get there? A. Yes.

Q. Another illustration used here are beaches. You are aware of beaches in New York City? A. Yes.

Q. And you are aware of transportation to get to them? A. Yes.

Q. And one could get to those beaches for one subway ride? A. Yes.

Q. That is 20 cents and for aged ten cents? A. Yes.

Q. Their are beaches in Nassau County? A. Yes, I am sure there are.

Q. And there is no subway system to make it quite so convenient, is there? A. No.

Q. The same would be true of parks? A. I would assume so.

Q. So these are items of budgeted need for people in New York City that are not items of budgeted (50) need for people in Nassau County and Westchester County? A. That is correct.

Q. So there is a difference— A. Budgeted in the sense of explaining the differential.

Q. Reflecting itself in the amount of money being given to people and the calculation of the grant? A. Right.

Q. So that were one of these counties, say Nassau, to show you tomorrow the distribution of museums, beaches, parks, day care centers and recreational centers in Nassau County, show you the transportation costs involved in getting there, that would not change the level of Nassau County's grants? A. Nassau County has made a request.

for an increase in the standard of assistance. This has been submitted with the approval of the Board of Supervisors of Nassau County and is undef consideration by our department at this time.

Q. Is there a showing in that request of various items explaining the differential in New York City? A. I haven't familiarized—

(51) Q. Is there a showing of the need for transportation to welfare centers, recreation centers for the aged, day care centers and so on? A. I couldn't answer your question. I don't know the specifics on which their request is based.

Q. Would a showing that food costs the same in Nassau County and Westchester County as New York City, clothing cost the same, furniture cost the same, utilities cost the same be sufficient to require increasing Nassau and Westchester to New York City?

Mr. Hoffman: I object to that question. It is hypothetical and speculative.

Mr. Albert: It is not speculative. The Commissioner is authorized to make that decision. I am asking if that kind of showing is what is expected.

Q. Would the fulfillment of those elements by phantom county, to avoid coming to a decision surrounding New York City or, indeed, upstate, require you to exercise your power to match the New York City standard? I left out special transportation needs on purpose. A. The phantom county would have to show that based upon the May 1968 prices that errors were made in the judgments then applied to those facts to warrant a (52) differential.

Q. Phantom County is one of those which in the May, 1968 pricing was grouped with New York City and is only showing what you found then, that clothing, furniture, utilities, food were the same. That showing today, then, would

not lead you to increase that to New York City; it is a fact you know from the May 1968 pricing? A. That is why we are reviewing the documentation submitted by, in this case, Phantom County, to determine the validity of the request.

Q. I understand that, but if a county merely shows that your 1968 figures were correct, merely shows what you know from the 1968 studies, I should think it would not require you to alter the existing regulations you promulgated just a month ago because, as you said, that is the basis for those schedules. Now, you haven't misread those. The facts are clear. You have explained the difference between New York City and others is not—surrounding New York City is not utilities, furniture and what not. We agree they are the same, do we not? A. Yes.

Q. If someone were to show you they are the (53) same, it would seem to me we are not advancing the inquiry at all, would it; you know they are the same. I am asking you, then—

Mr. Hoffman: I object to this line of questioning. You are giving him a whole series of leading questions here and you are always making assertions.

Mr. Albert: I don't think these questions are inadmissible. I hope I am not badgering him. I am not. I am merely trying to pinpoint what is the showing necessary to satisfy this legislation and your explanations of the differential between New York City and the others.

Q. Presumably that is to show a special need for transportation to the specific places you had enumerated. A. Well, I would be happy to answer your question except for the fact that I am in the midst of an administrative determination of this very question. So that until I have had an opportunity to familiarize myself with the evidence pre-

sented by Nassau County, I hesitate to answer your question. I would like to be as responsive as possible, but I don't think I can under the circumstances.

Q. In the drafting and enactment of the (54) legislation, did you have discussions, or your department, with the New York State Legislature? A. Yes.

Q. Did you request that amendment or your department? A. Request the amendment to authorize—

Q. Authorize you to increase or lower grants, the amendment of May 12th? A. I was not present at the time and I am not in a position to state.

Q. What was said? A. What was said?

Q. You understand your department had some discussions with the legislature? A. Yes.

Q. Who were the persons—who was in charge of the department at the time? A. The First Deputy Commissioner, George Chesebro.

Q. Do you know of any understanding between your department and the legislature or the legislative leaders regarding the implementation of the amendment?

Mr. Hoffman: I object to that. It calls for a hearsay answer, first of all.

(55) Mr. Albert: It is the administrator of the department.

Mr. Hoffman: You might ask Mr. Wyman if he had any understanding with any particular legislative leader but that is a very vague question.

Q. If the witness feels it is too vague to answer, say so. A. Yes, I do.

Q. Do you know of any understanding reached between your department and any legislator on the implementation—any legislative leader on the implementation of this statute, this amount? A. No, I do not know any of my own knowledge.

Q. Do you know as a result of your knowledge as a Commissioner of the State Department of Social Services? A. That is what I said, I don't know of any.

Q. Have you issued any regulations or interpretations or bulletins to local social service districts interpreting the key language of the amendment, a showing that the total cost of the items required to be provided actually is more than the schedule of monthly grants and allowances established by the statute? Did you issue any interpretation of that to (56) anyone? A. Not in detail, no.

Q. In summary form? A. Nothing more than the statute.

Q. You just repeated that language? A. As far as I know, that's all we have done.

Q. You have given no guidance to local social services officials beyond the statute language as to what kind of a showing they ought to prepare if they wish to raise or increase grants? A. That is correct.

Q. And the only one from whom you received a request for an increase is Nassau County? A. That is correct.

Q. You received no request from Westchester County? A. No.

Q. Suffolk County? A. No.

Mr. Albert: That's all.

Examination by Mr. Hoffman:

Q. Commissioner, what information did you use to arrive at the differential in utility costs? A. The study made in May of 1968.

(57) Q. What information did those studies have reference to? In other words, how was the differential in utility costs established by these studies? A. By determining the amount of BTU's, for example, required to heat a given space, a house of three rooms required so many BTU's to heat, and then this equivalent in fuel was priced

out to determine what that is or whether it was lights, light the building, whatever it was. The component was the basis and the variation is in the cost of obtaining those items.

Q. And you made reference to the official tariffed utility companies when you priced this out? A. Yes.

Q. And those differences in utility costs are reflected in the former schedules, SA-1, SA-2 and SA-3? Would those account for the differences or part of the differences in the amount of public assistance allotted to families depending on the geographic area in which they lived? A. Part of the allowance, yes; part of the difference. Excuse me.

Q. And that differential in utility cost is now presently carried over into the present scheme, (58) that is, the regulations which you have now promulgated pursuant to the new statute does reflect these differences in utility costs between various counties in the state? A. That is correct.

Q. Does your department periodically check on food prices and clothing prices? A. Annually.

Q. Annually. And what are the sources of your information? A. The basic requirements as developed by the U. S. Department of Agriculture forms the basis for the food and requirements and other items that go into the budget. These are then priced, as I explained earlier, or testified earlier, in stores.

Q. In other words, is there independent verification of these prices by members of your department? A. Yes.

Q. And that information is taken into consideration by your department when you do your annual pricing? A. That is correct.

Q. Now, under the former system, who was it that determined the specific items of need that (59) would be the subject of special grants? In other words, who made the first determination that certain items could be obtained through special grants? A. This was determined by the

State Board of Social Welfare in the promulgation of its results.

Q. And who actually provides these items of special needs? A. The local social services district.

Q. Are these provided to all welfare recipients or must they demonstrate some need for these items? A. They must demonstrate a need for them.

Q. Must they also request these items? A. Yes, they must request them.

Q. The newly promulgated schedule for counties outside of New York City contains maximum rates that are exclusive of rent and fuel, is that correct? A. Yes.

Q. And those maximum rates are also exclusive of day care and day care centers, is that correct? A. Yes.

Q. And homemaker services? A. Right.

(60) Q. And camp fees? A. Right.

Q. And household moving expenses? A. Correct.

Q. And security deposits? A. Right.

Q. And extermination fees? A. Right.

Q. And finders fees? A. Right.

Q. And life insurance premiums? A. Right.

Q. So that all of these items that I have just enumerated are not included in the scheduled maximum grant? A. That is correct, they are not.

Q. And is it possible that a resident who is living outside of New York City and whose rent exceeds the rent of the resident in New York City could conceivably receive a totally larger allocation of public assistance during a given month? A. Yes, he could.

Q. And isn't it possible that if all of these items that I just enumerated, purchase of (61) service items, rent and fuel, were taken into consideration that the average total expenditure per welfare recipient might often be greater or in some cases be greater outside of New York City than inside of New York City A. It is possible.

Q. Commissioner, what is the purpose of the flat grant provision in the statute? Why was that enacted by the legislature, if you know? A. It was done for two reasons: one, because there was a considerable feeling that to leave the promulgation of these standards solely to the administrator placed too great a responsibility, too much authority in a single person, and that because of the numbers of people affected and the dollars involved, that the elected public representatives should be the persons who actually established standards very much in the same way that the legislature establishes aid formulas in the education program. Then they assume full responsibility for what takes place.

Now, the other and equally important facet was to simplify and make more understandable the very cumbersome and difficult system previously in effect and to remove as much as possible the whim of (62) either the grantor of the special need item or the knowledge or intelligence of the individual who went to request the item. In other words, a simplified annual or monthly amount that could be easily understood by the taxpayers, the legislators and the recipients of assistance.

Q. So that the purpose of the flat grant provision in the statute and the purpose of the flat grants promulgated by your office are essentially a beneficial purpose, it was intended to improve the system.

Mr. Albert: That I really think is rather somewhat irrelevant, the Commissioner's opinion on beneficence or not.

Q. Did the Federal Government issue any material to the State urging the adoption of a flat grant system? A. Yes. And I might say that the authorities in the field have been urging this for many years.

Q. Now, when you promulgated a schedule for Nassau

County and for the surrounding counties, of course the maximum was already established by the statute for New York City? A. Correct.

(63) Q. You testified before that you took into account the difference in living style between New York City and the surrounding counties. A. That's right.

Q. And that this accounted for some of the differentials in the schedules, in Schedule SA-2, I believe—

Mr. Albert: I fear that is a misstatement in your question.

He stated it accounted for the differential between New York City and the surrounding counties.

Mr. Hoffman: I will rephrase my question.

Q. Is some of the differential between New York City and the surrounding counties accounted for by the difference in living style in New York City? A. Yes.

Q. Does this differential so reflect a difference in utility costs? A. No.

Q. No? A. Not to my knowledge.

Q. In other words, the sole criterion here was the difference in the style of living between (64) residents of New York City and residents of surrounding counties? A. Yes.

Q. Taking former schedule SA-1, under the former schedule, what would a single person receive? A. $66.

Q. And under the present schedule?

Mr. Albert: From where?

Mr. Hoffman: Counties surrounding New York City.

A. $65.

Q. That would be a difference of $1? A. That is correct.

Q. Is that exclusive of fuel and rent? A. As paid, yes.

Q. And items that would be covered by purchase of services? A. Right.

Q. Taking a family of two persons, what is the minimum limit for a family of two persons under the old schedule? A. $94.

Q. And what is the maximum limit? A. $118, depending in that case on the age of

(65) Q. That's right.

Now taking a median figure between $94 and $118—

Mr. Albert: You are asking him to work out—this is not testimony.

Mr. Hoffman: I am trying to simplify this.

Mr. Albert: You can leave that for your brief, though.

Q. Commissioner, in your opinion, is the need for recreational facilities greater for residents of New York City? A. I think it can be justified on the basis of the complexities of life in the largest urban center in the country, not only accessibility of it but the necessity for it in the light of the pressures and the hazards of life in this metropolis.

Q. And when you promulgated your schedule for the counties outside of New York City, you were taking into account transportation costs, is that correct? A. Not to the same extent, no.

Q. But were those costs taken into account? A. If it is solely transportation, no.

(66) Q. But when you made your total determination in terms of those counties, in other words, what the maximum of grant would be in the counties outside of New York City was one of your considerations in arriving at that maximum figure transportation cost? A. Yes.

Q. And in your opinion, do you believe that the transportation cost of residents outside of New York City

would not be as great as the transportation cost of transportation inside New York City? A. I can't say that because it is my understanding that transportation costs per ride in New York City are actually less than the same ride or distance in upstate New York.

Q. Is the transportation consideration governed only by the costs of transportation or does availability of facilities enter into it? A. Availability.

Q. Would you be able to elaborate on that further? A. I can give you an example. In some of the upstate counties there is absolutely no public transportation and no way in which people can move by bus from one part of the county to another. They must (67) rely on friends or relatives or their own means to get to whatever destination they wish to reach.

Q. When you promulgated the schedule for the suburban counties, did you also take into account the need for cultural and visiting cultural facilities in those counties? A. No, not to the same extent.

Q. Not to the same extent? A. No, because, as I said earlier, the hazards and the pressures of life in this city, it seems to me, are recognized as requiring this.

Q. So, in other words, those hazards and those pressures would account for the difference in maximum level between the persons surrounding New York City and persons within New York City? A. Yes.

Q. Do you intend to issue guidelines on the operation of the statute? A. We have issued substantial instructions and guidelines with respect to this subject.

Mr. Albert: Which statute?

Mr. Hoffman: I meant to specify.

Q. Do you intend to issue guidelines on the newly enacted amendment to the statute, I believe it (68) is subdivision 4.

Mr. Albert: Referring to increase and decrease of grant levels, I assume?

Mr. Hoffman: Yes, that is what I meant.

A. I wouldn't see any necessity for it.

Q. And pursuant to subdivision 4 of the statute, any social service district can apply to you for an increase? A. That is correct.

Q. What do you estimate as the amount of time that it would take your department to decide the application? A. This is difficult to say in every instance. I would think within a month of the time the request would be submitted.

Q. And is it true that you have an obligation to report to the State legislature? A. On recommendations for changes in the statute, is that your question?

Q. I didn't want to lead you, but, yes, that was my question. A. Yes, the law does require the State Board and Department to recommend revised standards annually.

Q. Would it also be possible on the basis of (69) this annual gathering of information which you are required to do, would it be possible for you unilaterally to upgrade standards if you felt that the cost of items was not being met by the present schedules? A. To the maximum stated in the statute, yes.

Q. So that you could unilaterally bring the other counties up to the maximum level in New York City on the basis of your own independent fact-finding? A. Correct.

Mr. Hoffman: That is all.

Mr. Albert: I will be very brief on redirect.

Examination by Mr. Albert:

Q. The special grants that were listed before for personal services, they are equally available to persons throughout the state? A. Yes.

Q. The power to grant is equal rent? A. Yes.

Q. Rent money only covers rent, one could not go to a museum on rent money unless one did not pay rent, is that correct? A. That is correct.

(70) Q. Indeed, one could not get a money grant for any of the special items, could one? A. They are purchased on their behalf, correct.

Q. So they must use the service, not the money grant as one could use the money grant generally for other purposes? A. That's right.

Q. So that if you assume with me that we were giving people different money grants in Nassau County, New York, that could not be offset by this uniform purchase of service method or rent?

Mr. Hoffman: What do you mean offset?

Q. If we were giving people $10 for food in New York City and $2 in Nassau County, this would not close that differential, would it? A. No, fortunately we are not giving those amounts.

Q. I said if you could assume with me. This is irrelevant to that differential and not close it a penny. A. You are correct.

Q. On the flat grant provision mentioned in the statute, are you familiar with the report called (71) Challenge and Response? A. Yes.

Q. Was that prepared by you or under your auspices? A. No. I had a hand in aiding in the development of it.

Q. And does your name appear on it? A. No, I think it is under the aegis of the State Board of Social Welfare.

Q. And are you in concurrence with its recommendations and statements? A. Yes, I am.

Q. Does it talk about a flat grant system? A. Yes, it does.

Q. Does that flat grant system resemble the flat grant provision in 131-a? A. Yes.

Q. Does it talk about simplifying age differentiated schedules? A. Yes, I believe it does.

Q. Does it describe the method for doing that? A. No. It talks in general terms.

Q. Does it talk about abolishing the cyclical (72) in New York City? A. No.

Q. Is that a flat grant, the cyclical grant? A. No.

Q. Why not? A. Because there were other variations in the grant for other items of special need.

Q. In itself, representing $100 per person for clothing and furniture, is that flat regarding clothing and furniture? A. Yes.

Q. No flat grant system had to abolish that to be a flat grant system, did it? A. No.

Q. The Federal Government's urging of the flat grant system was by what official? A. It was undertaken at a time when John Gardner was the Secretary of the Department of Health, Education and Welfare. Actually it was suggested and recommended when Ellen Winston was the Commissioner of Welfare.

Q. Does this appear in a regulation of the Department of Health, Education and Welfare? A. No.

(73) Q. Does anything recommending a flat grant system appear in the regulations of the HEW? A. Not to my knowledge. Q. In the handling of public assistance, all four thousand pages? A. Yes.

Q. Could you specify where that might appear? A. No, I can't.

Q. Does the provision of purchase of services, is that a flat grant? A. No.

Q. To get homemaker service, must one demonstrate need? A. Yes.

Q. To the same officials one demonstrated need before? A. Yes.

Q. Same discretionary judgment involved? A. Yes.

Q. Cab fees? A. Yes.

Q. Moving expenses? A. Yes.

Q. Security deposits? (74) A. Right.

Q. Burnouts? A. Right.

Q. That was added by you after the enactment of 131-a regulations? A. Yes, it was.

Q. Was it cumbersome and difficult as you characterized special grants before? A. I don't think so. We haven't had enough experience to answer your question specifically.

Q. As to those items they are no less cumbersome or more difficult? A. It should be less. Because the purchase will be from a provider, not of just a homemaker service for one individual but perhaps for an entire case load and the arrangements for paying for it will be in a lump sum or a substantial amount and, additionally, the advantage of it is that the people will actually receive the benefit and not be perhaps using the money given for homemaker service for some other extraneous act.

Q. Does the flat grant system necessarily entail either a reduction in the grant or an overall savings in welfare expenditures? (75) A. No.

Q. Indeed, could it not, if you arranged out all special grants, entail quite an increase? A. Oh, certainly, depending on where you set the amount.

Q. And isn't a condition of an enlightened flat grant system that you provide the regular grant for those items that previously were provided as special grants?

Mr. Hoffman: I object to the word "enlightened".

Q. Does enlightened pin—strike it.

In your opinion, Commissioner Wyman, is the flat grant system desirable for the reasons you stated before regardless of what it does with the special grants? A. I think so in large measure, yes.

Q. And would not the flattest grant be one which budgeted for just the simple items of universal need, say food and not for rent, because rent is a matter of individualized need upon demonstration? A. I think one of the biggest problems in setting a flat grant is to make certain that it is adequate. I think you can support the concept of the (76) flat grant if it is adequate. If it is inadequate, then, obviously, it is not as satisfactory a means of providing help for poor people.

Q. Isn't it a fact that rent and fuel now partakes more of the characteristics of a special grant than it does of the regular recurring or flat grant? A. Right, based on individual needs and requirements.

Q. Yes, and verification of same.

And there is quite a bit of department discretion involved in administering that? I refer to the levels of approval for different grants. A. This is dependent upon local policy.

Q. As to the difference in living style between persons in New York City and surrounding counties, was there a study made by your department of said differences? A. No.

Q. Are the pressures and anxiety and hazards that you referred to those you assume from it being an urban complex, is that correct? A. Yes.

Q. And the actual usage of facilities by (77) people under these pressures in New York City is not known to you, is it? A. No. Personally, no.

Q. By your department, the extent to which welfare recipients use the facilities available in New York City? A. Not that I know of.

Q. And comparatively with other counties, other recipients? A. No.

Q. Do you have any reference to the Bureau of Labor Department statistics on cost of living? A. Yes.

Q. For what purpose? For what purpose do you refer to those cost of living analyses and studies? A. In order to aid us in determining what the standard should be, what the medical assistance eligibility level should be.

Q. What about to aid you on the various components of the grant and their costs? A. Oh, yes.

Q. Are you aware that the Bureau of Labor statistics for the area of New York City includes the (78) surrounding counties as one unit? A. Yes.

Q. Is it correct to say that there never has been an item-by-item comparison, county-by-county in New York City? A. I don't think so.

Q. That really isn't the process that underlay 1, 2 and 3 or the new schedules, for that matter? A. That's correct.

Q. Indeed, would that not be, I should say the least, exceedingly expensive and a very cumbersome way of proceeding? A. I think so.

Q. Hence it is fair to say, isn't it, that the costs of various items such as food are rough estimates of areas and not specific counties? A. And that the differential isn't sufficient to warrant the kind of detail examination your earlier question pointed to.

Q. Correct. A. Right.

Q. That is perhaps why you didn't distinguish cost of food in New York City from the cost of food in the most rural upstate county? (79) A. That's right.

Q. Although there is some cost difference? A. There may well be, but it is insignificant in the overall.

Q. And the same would be true, for example, for cost of utilities in the areas that you grouped together, they may not be identical but if they are corresponding enough— A. Closely enough related.

Q. —that is sufficient.

In any case, you made no recent study of the costs of

utilities to explain the new schedules? A. Not since May of 1968.

Q. At which time you found the grouping in SA-1? A. Yes.

Q. Are you in the process now of, given the difficulty we discussed, of an item-by-item comparison, county-by-county, you are not in the process of doing that now, pursuant to the legislative amendment? A. No.

Q. And you don't contemplate that to be your job under this amendment, do you? A. No.

(80) Q. In fact, you contemplate your job under this amendment to be very similar to what it was in May 1968? A. Right. Unless some substantial variation appears when we do another pricing.

Q. When are you doing the next pricing? A. We would hope to do this in October, 1969 in order to meet our obligations under the statute to recommend whatever those changes warrant to the coming legislature in January 1970.

Q. The statute requests you to recommend cost of living data, does it not? A. Not that specifically. I have forgotten the exact wording but the essence is update.

Q. And to provide the legislature with information that is pertinent to their task? A. Right.

Q. With which they may do as they wish? A. That is right.

Q. They do not meet until 1970, is that correct? A. Early January 1970.

Q. And it was your practice to promulgate any schedules based on a study done in May sometime (81) during July or August following that May? A. That is correct.

Q. And then you afforded local departments about eight months to implement those schedules? A. Yes.

Q. What was the reason for such a long period? A. It had been shortened, as a matter of fact, from the previous

time limitations. If we were able to issue our rules, call it, for an arrangement, whereby if we could issue the new studies prior to the first of August, all districts would have to have them in effect by the first of January based on the May pricing, which meant, really, a nine-month period from the date of pricing to the date of actual implementation. However, if we failed to issue the regulations by the first of August, then they had as much as eight months beyond that. Now with what we are planning to do, there will still be a period October to July—we are assuming the legislature will put the new standards into effect the following July, a nine-month period, equivalent to the nine months period May to January in the past.

Q. Part of the reason for such substantial time is that it does take time to rebudget the caseload? (82) A. And to compile the data and to issue the instructions and to rebudget the caseload, plus accumulating sufficient funds at the local level to meet the increase, which has been the normal pattern over the past few years. In other words, to budget for it in the local government's annual budget.

Q. So when you say you could perhaps decide an application under the amendment for an increase within, say, a month, you don't mean by that, that upon your favorable decision, shall we say, in the next week we will have the new grant with the new schedules? A. That would depend upon the facility and rapidity with which the local department put the new schedules into effect.

Q. And those departments in the past have never exhibited that kind of facility? A. Not to my knowledge.

Q. In fact, it is impossible, isn't it? A. I think it would be extremely difficult.

Q. Final question. Referring to your testimony about the difference between New York City and Nassau and Westchester, is the need to make greater use of and therefore finance the cost of making (83) greater use of the

facilities you just listed? If differences are not based on any findings that these facilities or any facilities of the sort you mentioned are not available in Nassau or Westchester, are they? A. No.

Q. Or that it doesn't cost as much to make use of them if not more, no finding to that effect? A. No.

Q. You finance the making use of them in New York City to a greater extent? A. That is correct.

Mr. Albert: That's all.

Mr. Hoffman: Two or three questions.

By Mr. Hoffman:

Q. Was the flat grant project in New York City prior to the enactment of the U. S., was that approved by HEW? A. Yes, the Department of Health, Education and Welfare.

Q. And that was a cyclical grant? A. Yes, quarterly payments.

Q. Is that what cyclical means, quarterly payments? A. Yes, repeated in cycles for quarterly (84) payments of $25 per payment per person.

Q. And that was in lieu of special grants? A. Yes.

Q. And that was— A. In lieu of special grants for.

Q. Was that a permanent project? A. No.

Q. What kind of project was it? A. Well, the—I don't recall the time limit on it but the normal period was one year with reports as to progress and development for further periods. This may have been for a longer time. I am not absolutely certain.

(Discussion off the record.)

Q. The Bureau of Labor Statistics you were speaking about before, do they cover all items of need? A. They cover all items including medical care which is the item, incidentally, that has gone up most rapidly in cost of all components in the price index.

Deposition of George K. Wynne, Taken by the Plaintiffs.

Q. Do these statistics cover recreational and cultural items? A. I believe they do, yes.

Q. Would those statistics which group the New York area, which consider the New York area as one, would those statistics reflect the difference in life style between a person living in New York City and a person living in the surrounding areas? A. I don't know.

Q. Would you say that the amount of transportation cost allocated to the individual person, would that take into account the number of facilities available to a person in a given area? A. Oh, yes.

Q. Are you aware of the establishment of food stores in Nassau County for the benefit of persons? A. Yes.

Q. Do you know offhand how many food stores have been opened in Nassau County? A. I understand 30 or more. You are thinking now or you are stating now the food distribution points for surplus food distribution, are you not?

Q. Yes, that is what I mean; are these stores located on a county wide basis? A. It is my understanding they are.

Q. In different parts of the county? A. Yes.

Q. Rather than all at one small area? A. Yes. We hope more local districts will do the same as Nassau has done.

Q. Do you know the purpose of establishing all of these county wide food stores in Nassau County? A. Yes, it is to encourage a broader use of food supplement program and to make it more convenient for people to get the foods.

Mr. Hoffman: That's all.

By Mr. Alker:

Q. Do you know the percentage of recipients now participating in commodity distribution in Nassau County? A. No, but state wide it is less than half of the people, almost eligible are benefiting.

Deposition of George K. Wyman, Taken by the Plaintiffs.

Q. There is such a program in New York City today, is there not? A. Yes, there is.

Q. Which you can reach by subway, the distribution centers? A. I am sure they can be.

Q. Have you received a response from the Department of Health, Education, and Welfare to your (87) letter of June 2nd? A. Not yet.

Q. They deal with family budgets, they rather assume a common level of need of certain basic items of people, do they not? A. I believe so.

Q. And they don't therefore, take into account people who like more or desire more? They deal with low-income budget? It rather deals with the basics of life, does it not? A. Yes, I believe that's right.

Q. Until now, the New York State Welfare budgets have pretty much confined themselves to the basics of life, too, haven't they? A. Yes.

Q. And there hasn't been certainly very much conscious or articulate inclusion of such items as beaches, parks, museums and the like? A. No, although recreation is recognized as a growing need.

Q. Was there an amount budgeted for it before March 1962, an actual amount in the regular grant that you said, your department said, this per week for recreation per child or adult? (88) A. I don't believe there was. I am not sure.

Q. So the first time we receive inclusion of this item is with the simplifications worked by 131 a? A. Yes.

Q. Are you familiar with the monthly average grants to all recipients—I don't mean the exact amount, but do you keep monthly averages in various counties? A. Yes, and we publish them.

Q. And you publish them. Is it a fact the averages in Nassau and Westchester are certainly no less than the average in New York City? A. I think depending upon

a six-month average versus a monthly average, this can vary from month to month, but so far as I know, the averages in New York are higher than they are in the surrounding area.

Q. What if we exclude the aid to dependent children program and ask only about aid to the aged, blind and disabled? A. I assume that the statistical reporting is available to you. I don't happen to have it and I can't answer your question.

Mr. Hoffman: Off the record.

(Discussion off the record.)

(89) Q. Let me show you a chart which is labelled New York Public Assistance Expenditure Per Recipient by County, October, 1968.

I direct your attention to the figures in that chart. A. Yes.

Q. Overall they would seem to indicate the highest average per person grant in October, 1968, in all the programs, was Nassau County, Westchester coming a close second, New York somewhat a poor third or fourth. A. Yes.

Mr. Hoffman: I object to the characterization.

Q. How are you going to explain that? A. It is difficult to do for a single month. These averages will vary from time to time. It might serve your purpose better to take a six-month average or even an annual average because you have to remember that special need items were included previously on that.

Q. To your knowledge, if one took a six-month average or an annual average and compared all programs, Nassau County, Westchester and New York City, (90) would there be significant variations? A. I don't believe so.

Mr. Albert: I have no further questions.

(Witness excused.)

Mr. Albert: It is hereby stipulated and agreed between Lee A. Albert, counsel for plaintiffs and Hillel Hoffman, Assistant Attorney General, counsel for the defendant Wyman, that were Deputy Commissioner George Chesebro, Deputy Commissioner of the New York State Department of Social Services to have testified here today under oath, his testimony would conform in substance to the testimony of Commissioner George K. Wyman, Commissioner, New York State Department of Social Services.

Mr. Hoffman: Agreed.

(Time noted: 3:30 p.m.)

(911)

Certificate.

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

I, GEORGE WOLF, a Certified Shorthand Reporter and Notary Public within and for the State of New York, do hereby certify:

That GEORGE K. WYMAN, the witness whose deposition is hereinbefore set forth, was duly sworn by me and that such deposition is a true record of the testimony given by such witness.

I further testify that I am not related to any of the parties to this action by blood or marriage, and that I am in no way interested in the outcome of this matter.

In witness whereof, I have hereunto set my hand this 16th day of July 1969.

GEORGE WOLF,
George Wolf

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Defendants' Notice of Motion for Summary Judgment.

Sirs:

PLEASE TAKE NOTICE that upon the annexed affidavit of VERNON MURRAY, duly sworn to the 16th day of July, 1969 and upon the pleadings herein, the exhibits annexed thereto and all the proceedings heretofore had herein, the undersigned will move a statutory three-Judge Court impanelled to hear the instant case on July 17, 1969 at 10:30 a.m. for an order granting summary judgment in favor of defendants upon all of the grounds set forth in the moving papers herein and for such other and different relief as to the Court may seem just and proper.

Dated: New York, New York, July 16, 1969.

Yours, etc.,

LOUIS J. LEFKOWITZ,
Attorney General of the
State of New York,
Attorney for Defendants.

Affidavit of Vernon Murphy in Support of Defendants' Motion for Summary Judgment.

Vernon Murphy, being duly sworn, deposes and says:

I am a Senior Attorney in the office of George K. Wyman, Commissioner of Social Services of the State of New York and a defendant herein. I make this affidavit in support of defendants' motion for summary judgment in the instant action challenging the validity of Social Services Law § 131-a insofar as it prescribes or allows levels of payment for welfare recipients which vary as between New York City and other parts of the State.

The sole ground asserted by plaintiffs in this action is that the disparity in levels of welfare payment as between New York City and the suburban counties constitutes a denial of equal protection of the laws to welfare recipients in such counties. This is a palpably insufficient claim and the preliminary and permanent injunctions sought by plaintiffs are unwarranted.

Social Services Law § 131 establishes the general criteria for welfare assistance in this state and provides that the test of adequacy of such payments "shall be the sufficiency thereof for maintenance in accordance with standards of public health in the community * * *." Pursuant to this statutory responsibility, the Department of Social Services has determined the adequacy of such assistance in all categories of public assistance through the computation of standards of assistance calculated on the basis of the cost from year to year of the component items which comprise the level of subsistence found to be necessary for a welfare recipient. These items include food sufficient to provide a well-balanced, nutritional diet as well as adequate clothing, household items, laundry and personal incidentals. The level of need arrived at includes an amount sufficient to cover all these items, exclusive of rent

and fuel for heating, which are separate sums added to the monthly payment.

In August, 1968, the Department computed a revised standard of assistance for various parts of the State. The State was divided into three regions and the amounts payable to welfare recipients varied to some extent throughout the State. The region denominated "SA-1" consisted of New York City, Dutchess, Greene, Monroe, Nassau, Suffolk, Ulster and Westchester counties. One adult received $66 per month in this area. In the two upstate regions ("SA-2" and "SA-3") the figures were $63 and $60 respectively. These amounts are as we have seen, exclusive of rent and fuel for heating which are paid separately.

In 1968, the City of New York established a demonstration project, with the approval of this Department and the United States Department of Health, Education and Welfare, which permitted it to eliminate certain special grants for clothing and household replacements and to substitute therefor a cyclical grant of $100 per person per year. The City Department of Social Services expressly stated that "the nature of the urban crisis and the higher social cost of living in the metropolitan center requires a differential assistance level in these areas." It was this figure which was used as the basis for the current New York City level of $70 for one adult which is embodied in the present levels contained in § 131-a. Under § 131-a, the level outside New York City was fixed at $60 per month for one adult, again excluding rent and fuel. Both these figures also exclude the costs of homemaker services, moving, security deposits on apartments, and other expenses authorized to be directly paid by social services departments on a purchase of services basis, under which the local department will pay outright for these services over and above the grant to the recipient.

Affidavit of Vernon Murphy.

The determination of the Legislature to provide a higher standard for New York City was based in part on the high social cost of living in the urban center referred to by the City Department in its 1968 application. The Department's experience has shown that New York City welfare recipients' actual expenses substantially exceed those of recipients in the remainder of the State. This is due to their higher level of aspiration, greater expectations, the effects of living in a great metropolitan center, and the availability of and need for more recreational facilities than in a suburban or rural environment where children have more space in which to play. New York City life, realistically, in the experience of the Department, includes transportation to beaches, museums, and parks. It includes a higher crime rate which requires safety locks, greater loss of money and material from burglaries, as well as higher laundry and housecleaning expenses due to soot, air pollution and the like.

In fact, the monthly average payments per recipient vary substantially as between New York City and the suburban counties. The average payment on the Aid to Families with Department Children (AFDC) program — by far the largest component of welfare in this State — is $72.28 in New York City and $69.32 in the suburban counties. The variation under the Medical Assistance program is sharper — $123.57 in New York City, $91.55 in the suburban counties. The figures for the remainder of the State are substantially lower than those in the suburban counties. It is to be noted that the levels of welfare in New York State, both prior to the adoption of § 131-a and in that statute, are identical for all programs of welfare — AFDC, Aid to the Blind, Aid to the Disabled, and the like.

Moreover, the Legislature was plainly entitled to consider the sheer number of welfare recipients in New York

City—889,000 out of 1,211,000 in the State (1968 monthly average). The City warrants special consideration and the Legislature was simply recognizing that fact. In New York City per capita welfare expenditures per total population amounted in 1968 to $66.12; the statewide average is $39.12 and Nassau County only $13.83. Not one of the fifty-seven counties outside New York City was above the statewide average figure.

The resultant legislative determination was to establish separate schedules for New York City and for the remainder of the State, in keeping with the traditional legislative distinction between the City and the remainder of the State exemplified by the Multiple Dwelling Law, numerous provisions of the Code of Criminal Procedure, the structure of the courts, and other statutes. It was particularly appropriate where the vast majority of welfare recipients are within the City.

On May 2, 1969, § 131-a was amended by the addition of a new subdivision 4 which provides that the Commissioner of Social Services of the State may establish schedules of monthly grants in individual districts "for greater or lesser amounts" than those established under the law to reflect cost of living "but not to exceed the maximums prescribed" in New York City. The new subdivision also permits local social services officials, with the approval of the local legislative body, to apply to the State Department of Social Services for such a change in schedule.

It was the adoption of this amendment which caused the three-Judge court convened in *Rosado* v. *Wyman* to dissolve itself by order dated May 12, 1969, holding it "apparent that the constitutional issue posed is no longer justiciable. The constitutional attack on the provision as originally adopted has been rendered moot and any attack on the newly adopted subdivision would not be ripe for adjudication by this Court until there has been an opportunity

for action by state officials and until the matter comes before this Court in an appropriate proceeding." The Court explicitly held that the State Commissioner may increase the levels of payment for any county outside the City "either on his own motion or after an application by a local Social Services Officer with the consent of the local legislative body or upon the petition of an aggrieved party, pursuant to Article 78 of the New York Civil Practice Law and Rules."

Pursuant to this section, defendants established new levels of welfare payment for countries outside New York City on June 5, 1969, dividing the State outside the City into three areas parallel to the three areas created in the 1968 administrative determination of welfare payments. Nassau and Westchester Counties were in the highest of these three areas and the amount paid to one adult (exclusive of rent and fuel) in those countries was increased from $60 to $65. Nonetheless, those counties are free to apply for a further increase up to the New York City level and Nassau County has so applied. The three-Judge court in *Rosado* v. *Wyman, supra,* specifically held that a welfare recipient in a county which fails to make such application may proceed under Article 78 in the state courts to compel such an application.

That decision, dissolving the three-Judge court, is presently on appeal to the United States Court of Appeals, Second Circuit, and that appeal has been consolidated with the main appeal in *Rosado* v. *Wyman* taken by defendants from the injunction granted by the United States District Court, Eastern District of New York (WEINSTEIN, J.). These appeals raise the precise questions as to the jurisdiction of the federal courts over the question sought to be raised here, and of the ripeness of this question for adjudication, which plaintiffs raise here.

Affidavit of Vernon Murphy.

The preliminary injunction sought by plaintiffs would, under these circumstances, be most improvident. Aside from the pendency of the appeal in *Rosado,* preservation of the status quo mandates maintenance of the statutory and administratively-determined levels of welfare payment at their present level. To do otherwise would be to ignore the presumption of validity of the statute and, in fact, to presume its invalidity.

Moreover, any payments made by social services departments to plaintiffs or others in excess of present levels under a preliminary injunction would be completely irretrievable were the statute ultimately to be sustained. This would result in a substantial loss of federal, state and county funds which could in no way be recovered. On the contrary, maintenance of welfare payments at present levels would result in no irreparable harm to plaintiffs since any sums ultimately found to be owing them could be disbursed at that time. The loss of federal, state and local moneys which wold result from a preliminary injunction far outweighs any possible harm to plaintiffs from maintenance of the present levels *pendente lite.*

Moreover, plaintiffs' contention that they will receive less as a result of the slight disparity in levels of payment as between New York City and the suburban counties is conjectural at best. Rents are paid over and above the monthly allowances. And rents are, on the average, higher in the suburban counties than in New York City.*

I am informed by Marvin Rachlin, Assistant to the Commissioner of Social Services for Nassau County, that the amount of assistance that has been previously available

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*Average rent for welfare families of four in New York City as of 1968 was $83.90. In contrast, the lowest maximum rent allowance paid for Nassau county for even one person in one room is $100, and for four persons is $160 in an apartment or $155 in a house.

Affidavit of Leonard Murphy

I am further advised by Mr. Rachlin that plaintiff Miller's case was closed as of June 30, 1969.

I am informed by Mr. Murello of the Westchester County Department of Social Services that plaintiff Batson's allotment grant for July 1, 1969 is as follows:

Basic Maintenance	$ 60.00
Aid to the disabled	12.00
Aid to the blind	8.00
Special diet	11.00
Telephone	6.00
Delivery of food	4.00
Seeing Eye dog	12.00
Rental	8.00
Housekeeper (including meals and transportation)	24.00
Rent	108.00
Total	$ 273.00

Plaintiff Batson's budget after July 1, 1969 will be as follows:

Basic allowance	$ 60.00
Shelter	108.00
Total	$ 168.00

Both the former allowance provided to plaintiff Batson and the present allowance provided to plaintiff Batson are subject to a deduction of $10.80 which she received for social security.

Although plaintiff Batson will suffer a reduction as a result of the reassessment by the Social Services Law, this reduction bears little relationship to the differential be-

tween New York City recipients and recipients in the suburban counties. Were plaintiff Hatson to reside in New York City, her basic allotment would be $6 greater. However, as in the case of plaintiff Bethstein, plaintiff Hatson's rent allotment is approximately $21 greater than the rent allotment for an average family of four persons in New York City. It is therefore likely that plaintiff Hatson's total monthly grant may be greater than the total monthly grant of many New York City recipients similarly situated.

Under these circumstances, plaintiffs fall far short of showing any present entitlement to the preliminary injunction they seek. In fact, the record amply demonstrates the factual basis for the slight difference in welfare payments between New York City and the suburban counties. No material issue of fact exists in this case and summary judgment should be granted defendants dismissing the complaint.

Sworn to by Vernon Murphy, July 15, 1969.

Opinion of Statutory Three-Judge Court

Before Hays, Circuit Judge, and Mansfield and Motley, District Judges.

Mansfield, D.J.

Plaintiffs in this class action are aged, blind and disabled welfare recipients residing in Nassau and Westchester counties, New York. They receive payments under a cooperative federal-New York State assistance program established pursuant to the Social Security Act, 42 U.S.C. §§ 301, *et seq.*, §1381. The program, which must meet certain federal requirements, is financed jointly by the two governments and administered in the State of New York pursuant to its Social Services Law, §§ 131, *et seq.* and regulations promulgated thereunder by its Department of Social Services. Plaintiffs attack a recent amendment of that law, § 131-a, which has resulted in their receiving lower payments than welfare recipients residing in New York City, as violative of the Equal Protection clause of the Fourteenth Amendment and of certain provisions of the Social Security Act as amended, 42 U.S.C. §§ 301, *et seq.*, §§1382(a)(1), 1382(a)(3) and 1382(a)(7). They seek of relief that [illegible] declaratory judgment to the effect that the amendment is unlawful, and preliminary and permanent injunctions enjoining [illegible] enforcement and implementation of the amendment that would reduce public assistance payments received by them below the level available to residents of New York City. Defendants have cross-moved for summary judgment.

For the reasons stated herein, preliminary injunctive relief is granted and defendants' motion for summary judgment is denied.

At all times here involved New York's Social Services Law, § 131, has imposed upon state, county, city and town social services officials the duty to provide adequately

requirements, including rent, fuel for heat, and various non-recurring, emergency or special needs, was made the subject of separate or special grants and allowances, which are not in issue here except to the extent that they constitute a background leading to the New York Legislature's effort, in adopting § 131-a in 1968, to simplify the cumbersome and complicated structure of welfare grants within the State by making greater use of the so-called "flat grant" system.

In making the calculations forming the basis of the standard of essential needs, the Department did not engage in a county by county analysis of the cost of each of the component items, except with respect to utilities, since the variations in cost between counties was not sufficient to warrant any differentiation. For instance, the relevant schedule of costs published by the Bureau of Labor Statistics, U. S. Department of Labor, which was among the publications used by defendant in making its computations, placed New York City and surrounding counties in the same classification. After defendants thus arrived at proposed levels of need annually, they then relodgeted the case load for the State, taking into consideration the availability of funds at the local level, and recommended revised standards to the State Legislature.

Prior to the recent enactment of § 131-a the last such cost survey made by the State Department of Social Services was in May, 1968, following which the Department, in August 1968, divided the State into three regions known as "SAU 1," "SAU 2" and "SAU 3," for each of which a separate level was established for recipients in that region. The differences between the levels for the three regions were based on variations in utility costs. The region known as SAU 1, as thus established by defendants, included New York City and the counties of Dutchess, Greene, Montgomery, Nassau, Suffolk, Ulster and Westchester (hereinafter

sometimes referred to as the "surrounding counties"). The levels established for recipients in the SA-1 region varied according to the number of persons in each household and the age of the dependent children in the household. The level for a single person household, for instance, was established at $66 per month and was increased in gradations to a high of $464 for a household of 10 persons, the exact amount depending on the age of the various children in the household.' The important fact for purpose of the present application is that as of August, 1968 the Department of Social Services had concluded that the cost of the essential recurring items going into the allowance level for welfare recipients did not vary sufficiently between New York City and its surrounding counties to warrant any differentiation between the standards of needs for such recipients. Title 18, N.Y.C.R.R., § 352.4.'

On March 31, 1969 the New York Legislature enacted § 131-a (Laws of 1969, ch. 184), which established two schedules of maximum flat monthly grants of public assistance (exclusive of shelter and fuel for heating) allowable to recipients, one applicable to New York City and the other to all other social services districts in New York State, as follows:

	Number of Persons in Household							Each
	1	2	3	4	5	6	7	Additional
New York City	70	116	162	208	254	297	340	43
Outside New York City	60	101	142	183	224	257	290	33

A differential in favor of the New York City recipients was thus approved, subject to change or elimination by defendants' promulgation of a schedule of lesser monthly allowance levels for any social services district upon a showing that the total cost of the items required to be provided

in the schedule actually was less than the schedule established by regulations of the Department.

On May 2, 1969, the Legislature amended the recently adopted § 131-a (Laws of 1969, ch. 411) to permit the Commissioner to *raise or lower* the levels of the schedules for all districts except New York City upon a showing that such a revision was warranted by the cost of the items included in such schedules, subject to the condition that the levels of schedules for districts outside of New York City could not exceed the maximums prescribed for New York City. Thus, as finally amended, § 131-a established a maximum level for New York City that could not be reduced by defendants and a lower so-called "maximum" level for all other social services districts that could be reduced or increased (notwithstanding its characterization as "maximum") up to the New York City level.

The Legislature's reason for thus differentiating between New York City and its surrounding counties, and for guaranteeing a maximum level to the welfare recipients in the former while subjecting those in the latter to the possibility of an increase or decrease in assistance at defendants' discretion, is a mystery, particularly in view of the Department's past practice of grouping them in one classification on the basis of data that had not changed prior to the adoption of § 131-a. The "Legislative Findings and Purpose" set forth at the outset of the amendment contain a declaration by the Legislature to the effect that it was necessary to establish schedules "based upon the costs of delivering the needs of public assistance recipients in the respective social services districts of the State." However, the only relevant cost data available to the Legislature was the 1968 cost study that had led the Department of Social Services administratively to establish the schedule of needs for recipients in New York City and surrounding counties at identical levels.

before it any evidence pertaining to the cost or use of such cultural opportunities. On the other hand, plaintiffs have furnished extensive evidence, including detailed analyses of transportation costs made by the Nassau County Planning Commission, establishing that the cost of transportation to museums, clinics and other types of recreational facilities in Nassau is substantially higher than that in New York City.[5] Although defendant apparently concedes that the Legislature did not establish the differential between New York City and surrounding counties upon the theory now advanced by him, he points out that the New York City Department of Social Services, in connection with a 1968 demonstration project which provided for a flat annual cyclical grant of $100 per year in lieu of *special* grants to recipients for certain types of clothing and household items, stated that "the nature of the urban crisis and the higher social cost of living in the metropolitan center requires a differential assistance level in these areas." However, such *special* grants were for items not embraced by the allowances here under consideration. Furthermore, although defendant Wyman had the foregoing statement available to him in 1968, he nevertheless established identical levels for New York City and its surrounding counties. Thus there is nothing in the record before us at this time to support the theory that the Legislature established a differential based upon a higher "social cost of living" in New York City.

In support of their application for preliminary relief plaintiffs urge that § 131-a and the regulations established by defendants thereunder violates their rights under the Equal Protection Clause of the Fourteenth Amendment for the reason that it creates an irrational, unjustifiable inequality between welfare allowances granted to residents of New York City and those of surrounding counties, with the result that even though the gap has been partially re-

duced by defendants' administrative action, it is substantial enough to cause irreparable injury to plaintiffs and persons in the same class, who live at a bare subsistence level and for whom the sum of $5 per month can be crucial in mitigating their hardship and suffering and enabling them to survive. In the alternative, plaintiffs urge that § 131-a violates the provisions of the Social Security Act, 42 U.S.C. §§ 302(a)(1), 1202(a)(1), 1352(a)(1), 1382(a)(1), requiring that standards of need established under a cooperative federal-state assistance program be state-wide and uniform in character.

The Equal Protection Claim

Turning first to the constitutional issue, which forms the basis of this Court's jurisdiction under 28 U.S.C. § 2281, we advert initially to certain fundamental principles by which we are governed in assessing plaintiffs' contention that their rights to equal protection have been violated. At the outset we recognize that since the Equal Protection Clause applies to persons rather than places, "'[t]erritorial uniformity is not a constitutional requisite,'" *Salsburg* v. *Maryland*, 346 U. S. 545, 552 (1953), and that generally "there is no rule that counties, as counties, must be treated alike." *Griffin* v. *School Board*, 377 U. S. 218, 230 (1963). With the needs and desires of its various subdivisions in mind, a state has the constitutional power to legislate in a manner which may create inequalities between those residing within different local governmental units, provided the statutory discriminations rest on grounds relevant to the statute's purposes. *Griffin* v. *School Board*, *supra*; *McGowan* v. *Maryland*, 366 U. S. 420, 425 (1960); *Salsburg* v. *Maryland*, *supra*. However, a legislative discrimination which is purely arbitrary and draws invidious, irrational distinctions cannot withstand a Fourteenth

Amendment attack. *Gulf, Colorado & Santa Fe Ry.* v. *Ellis*, 165 U. S. 150 (1896).

The line between constitutionally permissible and impermissible legislative inequalities is far from crystal clear. "Notions of what constitutes equal treatment for purposes of the Equal Protection Clause *do* change." *Harper* v. *Virginia Bd. of Elections*, 383 U. S. 663, 669 (1965). Certain broad principles, however, are now well established. When the challenged classifications pertain to the conduct of business transactions, the Supreme Court has freely recognized the difficult problems and interests that state legislatures must balance. In such cases, even though the reason for the statute may be unstated and difficult to discern from surrounding circumstances, the presumption in favor of validity is favored. *Brown* v. *Maryland*, 25 U. S. (12 Wheat) 419, 436 (1827), and we are guided by the principle that "[a] statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it." *McGowan* v. *Maryland*, 366 U. S. 420, 426 (1960) (state Sunday closing laws). Absent an invidious distinction, or one affecting a fundamental or critical personal right, wisdom dictates that in the interest of maintaining a proper balance between state and federal authorities the Equal Protection Clause should not be used to interfere with the state legislative process. The need or appropriateness of legislation is to be determined by the legislature, not the courts, and the latter should not substitute their economic or social beliefs for those of the former. *Ferguson* v. *Skrupa*, 372 U. S. 726 (1962). We do not "sit as a superlegislature." *Salsburg* v. *Maryland*, 346 U. S. 545, 550 (1953). Traditionally such business and economic legislation, even though it might create inequalities, has withstood attack if it could possibly bear some reasonable relationship to the statutory purpose. *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U. S. 61 (1911)

(regulating drilling for natural gas); *Morey* v. *Doud*, 354 U. S. 457, 463, 464 (1957) (regulating use of premises as "currency exchanges"); *Williamson* v. *Lee Optical Co.*, 348 U. S. 483, 489 (1954) (regulating the sale of eye glasses); *Ft. Smith Light Co.* v. *Paving Dist.*, 274 U. S. 387 (1926) (imposing duty to repair on street railways).

Where legislative classifications create inequalities affecting the exercise of fundamental or critical personal rights, however, a more stringent standard is applied in determining whether such distinctions are prohibited by the Equal Protection Clause. Particularly where they operate to the detriment of a disadvantaged minority, they are "closely scrutinized and carefully confined." *Harper* v. *Virginia Bd. of Elections*, *supra* at 670. Mere speculation as to a possible rational basis or justification for the distinction is insufficient. "Such a law, even though enacted pursuant to a valid state interest bears a heavy burden of justification, . . . and will be upheld only if it is necessary, and not merely rationally related, to the accomplishment of a permissible state policy." *McLaughlin* v. *Florida*, 379 U. S. 184, 196 (1964) (striking down state law prohibiting interracial marriage). The standard has more recently been described in even stricter terms as one making constitutionality depend upon whether the statute "promotes a *compelling* state interest." *Shapiro* v. *Thompson*, 37 U.S.L.W. 4333, 4339–(1969) (holding unconstitutional residency requirements for welfare payments); see also *Hobson* v. *Hansen*, 269 F. Supp. 401, 506-507 (D. C. 1967) (Wright sitting by designation).

Receipt of welfare benefits may not at the present time constitute the exercise of a constitutional right. But among our Constitution's expressed purposes was the desire to "insure domestic tranquility" and "promote the general Welfare." Implicit in those phrases are certain basic concepts of humanity and decency. One of these,

voiced as a goal in recent years by most responsible governmental leaders, both federal and state, is the desire to insure that indigent, unemployable citizens will at least have the bare minimums required for existence, without which our expressed fundamental constitutional rights and liberties frequently cannot be exercised and therefore become meaningless.' Legislation with respect to welfare assistance, therefore, like that dealing with public education, access to public parks or playgrounds, or use of the mails, deals with a critical aspect of the personal lives of our citizens, whether such assistance be labeled a "right," "privilege" or "benefit." See *Sherbert* v. *Verner*, 374 U. S. 398, 404 (1962). Its importance is magnified by the defenseless and disadvantaged state of the class of citizens to which it relates, who are usually less able than others to enforce their rights. It can hardly be doubted that the subsistence level of our indigent and unemployable aged, blind and disabled involves a more crucial aspect of life and liberty than the right to operate a business on Sunday or to extract gas from subsoil. We believe that with the stakes so high in terms of human misery the equal protection standard to be applied should be stricter than that used upon review of commercial legislation and more nearly approximate that applied to laws affecting fundamental constitutional rights.' Poverty is a bitter enough brew. It should not be made even less palatable by the addition of unjustifiable inequalities or discriminations. It must not be forgotten that in most cases public assistance represents the last resource of those bereft of any alternative. Equity (the state or quality of being equal, derived from the latin *aequitas*), should least of all be denied the poor.'

Applying the foregoing principles to § 131-a of the Social Services Law, we must conclude, on the basis of the record now before us, that the differential between al-

lowance levels established for welfare recipients in New York City and those in surrounding counties constitutes an arbitrary, invidious and irrational inequality in violation of the Equal Protection Clause, even when judged by the traditional, rather than the more stringent, standard. Turning first to the statute itself, if the Legislature had not gone to the trouble of expressly stating its "Findings and Purpose" more room might exist for speculation as to a possible reasonable basis for the unequal treatment of recipients. But its reasons are expressed, and in some detail. While recognizing certain advantages in a uniform schedule of monthly grants and allowances, the statement fails completely to provide any reason for the uneven treatment of recipients in New York City, on the one hand, and those in surrounding counties, on the other, except to imply that it was the result of budgetary considerations.

There is not a scintilla of evidence that the difference between the level of the schedules prescribed by the Legislature for New York City and for its surrounding counties, respectively, could be justified on the basis of a difference in cost of the essential items forming the basis of those levels. Indeed, the evidence before us is clear and undisputed that the cost of those essential items was the same for New York City as for the seven surrounding counties. In the face of such convincing and uncontroverted evidence we cannot, therefore, assume that the Legislature founded the statutory disparity upon a geographical variation in cost of the component items. Nor would we be warranted in upholding the discrimination as being in furtherance of a legislative desire to reduce welfare costs, an objective recently rejected by the Supreme Court in *Shapiro* v. *Thompson, supra:*

> "We recognize that a State has a valid interest in preserving the fiscal integrity of its programs. It

> may legitimately attempt to limit its expenditures, whether for public assistance, public education, or any other program. But a State may not accomplish such a purpose by invidious distinctions between classes of its citizens. It could not, for example, reduce expenditures for education by barring indigent children from its schools. Similarly, in the cases before us, appellants must do more than show that denying welfare benefits to new residents saves money. The saving of welfare costs cannot be a independent ground for an invidious classification." (*Shapiro* v. *Thompson*, 37 U.S.L.W. 4333, 4337 (April 22, 1969))

Thus a reduction in welfare benefits is permissible under the Equal Protection Clause only if it is not effected through arbitrary inequalities.

Pursuant to the provisions of § 131-a as enacted by the Legislature, defendant Wyman might have promulgated new schedules for the surrounding counties, which would raise their allowance levels to the level prescribed for New York City. In that event the constitutional issue before us might have become moot, a consideration which prompted the three-judge court in *Rosado* v. *Wyman*, —— F. Supp. —— (1969) to dissolve itself and remand that case to Judge Weinstein.[7] However, although Commissioner Wyman has reduced the gap between the levels for New York City and the surrounding counties by promulgation of new schedules, there remains a difference of approximately $4 to $5 per person between the levels of the two schedules. While this may seem minor to most citizens, it is of crucial importance to the recipients here, who present tragic hardship cases, some of them already the victims of severe cutbacks in other forms of special aid formerly received (e.g., telephone service for medicines

and groceries; food for seeing-eye dogs; transportation allowances to hospitals; special diets for diabetics; readers for the blind; "homemakers" for those confined to wheelchairs; etc.). To an indigent person now receiving approximately 90¢ per day for food, an additional 15¢ per day can hardly be described as *de minimis*. Access to such bare necessities of life, on a non-discriminatory basis, involves a critical interest for those whose life depends on it. The issue has not, therefore, been mooted and the constitutional question remains a substantial one.

The bases advanced by defendant for upholding § 131-a, or at least deferring preliminary relief, are wholly lacking in persuasion. The first of these is that the needs of New York City welfare recipients are greater than those of recipients elsewhere because of what is termed "the higher social cost of living." At first blush there might appear to be something to the proposition that the plight of the welfare recipient living in grim and dismal quarters in a New York City ghetto is so miserable and frustrating that he is led to make greater use of parks, beaches, museums, recreational and cultural centers than is the recipient in the City's suburban counties, particularly since these facilities are within easier reach in New York City. The need for such facilities, referred to euphemistically by defendants as arising from "a higher level of aspiration" and "greater expectations," would require funds not only for transportation but also for payment for use of those not furnished free of charge (e.g., admission fees to a semi-public beach).

In the absence of an iota of evidence to support an assumption that welfare recipients encounter such a "higher social cost of living," we find ourselves unable to accept it. We question whether the aged, blind and disabled are able, in view of their physical handicaps, to make any appreciable use of many of the facilities de-

scribed by the defendant, such as beaches and museums. Furthermore, is it reasonable to assume that welfare recipients living at or below a subsistence level, who are provided for their nutritional needs with less than $1 per day (the buying power of which is diminishing weekly as the cost of living rises sharply), will sacrifice any substantial part of their meager payments in favor of cultural, recreational and educational benefits? We doubt it. Even if it could be shown that a part of such payments is used for these purposes, defendant erroneously assumes that welfare recipients in the suburban counties live in more pleasant and less frustrating surroundings than those in New York City. The picture of suburban welfare recipients living in garden apartments (the term used on oral argument), located on the edge of a park, is an unreal one. It ignores the existence of many rundown tenements in the slum districts of our surrounding suburban counties, which unfortunately provide the principal housing facilities for welfare recipients. Under such circumstances we cannot accept the proposition that recipients living in similar conditions in New York City need or use recreational or cultural facilities more than do recipients in suburban areas.

In any event, extensive and reliable proof has been offered by plaintiffs to the effect that the cost of transportation to recreational facilities, museums, beaches and hospitals in the surrounding counties, such as Nassau, is substantially greater than that incurred by New York City residents who are located closer to such facilities and have cheaper transportation available to them. For instance, while New York City residents can normally travel quickly to parks, beaches, museums and hospitals for the cost of a subway ride (ten cents each way for the elderly, twenty cents for all others), residents out-

side of New York City are faced with public transportation provided by a number of private companies at much higher costs (up to $1.70 per trip), requiring numerous transfers and considerably more time and expense. Consequently, defendants' argument that the disparity in levels is justified by New York City residents' increased need for and cost of transportation to such facilities must be rejected on the record before us.

We also find no merit in defendants' further argument, that in view of the pendency of a petition by Nassau County for an increase in the allowance levels promulgated for it and the availability to surrounding counties of various other state remedies as a means of seeking an increase in the level of payments available to them, the constitutional issue is not ripe for determination. The situation has changed substantially since the three-judge court in *Rosado* v. *Wyman* dissolved itself on the ground that the issue raising its jurisdiction (essentially the issue now before this Court) might be rendered moot by administrative action. Administrative action now has been taken and it has failed to moot the issue. Any further delay could work substantial and irreparable injury to plaintiffs. We have no assurance that the issues would be promptly resolved by any of the state court procedures suggested by defendants. No reasons exist, therefore, for abstention;[12] and exhaustion of state court remedies is not a prerequisite. *King* v. *Smith*, 392 U. S. 309, 312, fn. 4 (1968); *Damico* v. *California*, 389 U. S. 416 (1969); *McNeese* v. *Board of Education*, 373 U. S. 668 (1963); *Frozen Food Express* v. *United States*, 351 U. S. 40 (1956); *Holmes* v. *New York City Housing Authority*, 398 F. 2d 262 (2d Cir. 1968).

The Claim of Violation of the Social Security Act

In view of our disposition of the constitutional issue, upon which our jurisdiction is grounded, it is unnecesary to dwell at length on plaintiffs' alternate contention that § 131-a violates applicable provisions of the Social Security Act, an issue over which this Court has pendent jurisdiction. *Smith* v. *King*, 277 F. Supp. 31 (1967). Plaintiffs' argument is founded on the proposition that 42 U.S.C. § 302(a)(1) and § 1382(a)(1), and regulations promulgated thereunder by the Department of Health, Education and Welfare ("H.E.W."), require states participating in federally-financed assistance programs to conduct them on a state-wide basis pursuant to uniform standards. Applying that principle here, plaintiffs contend that, while the application of such uniform standards may lead to different levels of assistance in different areas of a state, § 131-a is fatally defective for the reason that it simply creates disparities arbitrarily and without adoption or application of uniform standards. See *King* v. *Smith*, 392 U. S. 309, 326-327 (1968).

Section 302 deals with state plans for old-age assistance and medical assistance for the aged while § 1382 is concerned with State plans for aid to the aged, blind and disabled, and medical assistance for the aged. Both statutes require in subsection (a)(1) that any such plan

> "... provide that it shall be in effect in all political subdivisions of the State, and, if administered by them be mandatory upon them."

Further support for a requirement of state-wide uniform standards is found in regulations recently promulgated by the H.E.W., 34 *Federal Register* No. 19, pp. 1394-1395 (Jan. 29, 1969), and codified as 45 C.F.R. § 233.20, which

direct that state plans "[p]rovide that the standard [of assistance] will be uniformly applied throughout the State," 45 C.F.R. § 233.20(2)(iii), and

> "[p]rovide that payment will be based on the determination of that amount of assistance needed and that, if full individual payments are precluded by maximums or insufficient funds, adjudgments will be made by methods applied uniformly statewide. 45 C.F.R. § 233.20(3)(viii)."

On their face the foregoing provisions of the Social Security Act and regulations would appear to be aimed at the fundamentally sound objective of assuring that persons in like circumstances should be treated equally throughout a state rather than exposed to the type of unfair hodge-podge that could result from adoption of different eligibility standards or other criteria for different areas. Indeed, a quotation cited by plaintiffs from a letter of James Callison, H.E.W. Regional Commissioner for Region II (which includes New York State) to defendants, dated April 16, 1969, indicates this was the H.E.W.'s objective in inquiring whether the differential between levels promulgated under § 131-a for New York City and other areas of the State "may be justified on the basis of differences in the cost of living in local areas." Plaintiffs' non-constitutional argument, however, is based primarily on regulations promulgated by H.E.W. Since the schedules and regulations adopted by defendants are now under review by that agency, which possesses considerable expertise with respect to its own regulations and should be entitled to interpret them in the light of the complexity of problems presented by various welfare programs, see 45 C.F.R. § 233.20(1), we at this stage defer determination as to the requirements of the Social Security Act in anticipation of a ruling by H.E.W.

Preliminary Relief

Having thus made a clear showing of probable success, plaintiffs have also demonstrated that denial of preliminary relief will work a much more severe hardship upon them, amounting to irreparable injury, than any hardship that would result to defendants from the granting of preliminary relief. *Clairol Incorporated* v. *Gillette Company*, 389 F. 2d 264 (2d Cir. 1968); *Unicon Management Corp.* v. *Koppers Company*, 366 F. 2d 199, 204 (2d Cir. 1966); *Dino de Laurentiis Cinematographica, S.p.A.* v. *D-150, Inc.*, 366 F. 2d 373, 375 (2d Cir. 1966). To plaintiffs the difference between the monthly payments to them and to recipients in New York City represents the bare essentials of life, whereas if defendants should ultimately prevail any such differentials paid in the interim to plaintiffs and others similarly situated would be recoverable or offset against future allowances. Since no issue has been raised, upon this application for preliminary relief, as to the classification of the lawsuit as a class action under Rule 23, F.R.C.P., the action will be treated as such for purposes of temporary relief.

Accordingly, plaintiffs' motion for preliminary relief is granted to the extent that pending trial and final determination of the action defendants will be restrained from further enforcement or implementation of § 131-a of the New York Social Services Law, or from promulgating schedules of grants and allowances of public assistance, or making payments thereof to recipients, other than according to objective, non-discriminatory standards based upon the cost of the needs of such recipients. Trial of the action will commence on October 6, 1969 at 10:00 A.M. Defendants' motion for summary judgment is denied.

The foregoing constitutes the Court's findings of facts and conclusions of law pursuant to Rule 52(a), F.R.C.P.

Submit order on notice in accordance with Rule 65(d), F.R.C.P.

Dated: August 4, 1969.

s/
Paul R. Hays,
U. S. Circuit Judge

s/
Walter R. Mansfield,
U. S. District Judge

s/
Constance Baker Motley,
U. S. District Judge

Footnotes

[1] "A state plan . . . must . . . provide that it shall be in effect in all political subdivisions of the State, and, if administered by them, be mandatory upon them." 42 U.S.C. § 302(a)(1) (Old Age Assistance). Identical requirements are found in § 1202(a)(1) (Aid to the Blind); § 1352(a)(1) (Aid to the Permanently and Totally Disabled); and § 1382(a)(1) (the combined program of Aid to the Aged, Blind or Disabled and Medical Assistance to the Aged). Since New York administers a composite program under § 1382, that statute will be refered to herein as the basis for plaintiffs' claim.

[2] In 1968 the City of New York with H.E.W. approval, established a demonstration project authorizing the elimination of *special* grants for certain clothing and household replacements and the payment, in lieu thereof, of the sum of $100 per year to each recipient. This experiment in the flat grant approach to public assistance was believed by some to offer certain advantages, including less affront to a recipient's dignity than the special grant method, more opportunity for the recipient to budget, reduction of administrative costs, and freeing caseworkers for counseling duties.

[3] "352.4 *Needs—items of basic maintenance*

. . . . . .

"(2) The pre-added monthly allowance schedule for food, clothing, personal incidentals, household supplies, school expenses, utilities, laundry for AABD, expenses incident to AABD, including sales taxes related thereto, shall be as follows." (Codes Rules and Regs. of State of N. Y. Title 18, § 352.4)

There follows a schedule of identical monthly sums for New York City and the Counties of Dutchess, Greene, Monroe, Nassau, Suffolk, Ulster and Westchester.

[4] Plaintiffs have introduced extensive evidence supporting the conclusion that New York City and surrounding counties should be treated identically. The United States Department of Labor's Bureau of Labor Statistics prepares and presents costs of living material for the New York metropolitan area without drawing any distinction in living costs between New York City and the surrounding counties, whereas distinctions are drawn between such metropolitan area and the rest of the state. See, e.g., *Three Standards of Living for an Urban Family of Four Persons*, U. S. Dept. of Labor, 1969, p. 16; *Standard Metropolitan Statistical Areas*, U. S. Bureau of the Budget, 1967.

Footnotes.

A comparison of cost figures published by New York City, Westchester and Nassau for major items forming components of the grant levels under consideration reveals that the cost of most basic items of food and clothing are identical, where as most household furnishings cost more in Westchester and Nassau than in New York City, possibly because of greater competition and more second hand stores in New York City. See *Handbook for Case Units*, New York City Dept. of Social Services, Jan. 1968; *Price Guide Bulletin* #9, Westchester County Dept. of Social Service (1967); *Price Guide—Clothing & Household Furnishings*, Nassau County Dept. of Social Services, Oct. 1, 1968.

[8] See affidavit of John Calbreath Burdis, Planning Director, Nassau County Planning Commission, and exhibits thereto.

[9] Welfare assistance does represent a statutory right, as distinguished from charity. If a person meets the requirements prescribed by statute under a federally assisted program, the agency is obligated to recognize his claim. See Reich, The New Property, 73 Yale L. J. 733, 785-786 (1964); Note, Development in Law, Equal Protection, 82 Harv. L. R. 1065, 1192 (1969).

[10] The concept was expressed by President Roosevelt in his June 8, 1934 message to Congress recommending legislation on economic security:

> "Among our objectives I place the security of the men, women, and children of the Nation first.
>
> "This security for the individual and for the family concerns itself primarily with three factors. People want decent homes to live in; they want to locate them where they can engage in productive work; and they want some safegurad against misfortunes which cannot be wholly eliminated in this man-made world of ours."

The substance of the message has been repeated by every President since that date.

[11] Our constitutional guarantees dictate the abandonment of a philosophy, which has long prevailed in many quarters, that the poor and disabled must be treated as "nonperson allowed to receive charity but not entitled to equal rights."

[12] The surrounding counties would still be discriminated against to the extent that § 131-a, as amended, guarantees New York City recipients the maximum level, whereas those in surrounding counties are forced to establish that the total costs of items included in the schedules applicable to their districts is more than the cost thereof

reflected in such schedules. Since the evidence before us, however, indicates that the costs are identical, the Commissioner would be required to raise the levels of the surrounding counties to that of New York City.

[10] The standards promulgated under the Social Services Law are described by Joseph S. Barbaro, Commissioner of Social Services for Nassau County, who has carefully studied the needs of welfare recipients, as follows:

> "The present standards of assistance provide for life on a level of sustenance, nothing more, and often less. The standards which will go into effect on July 1, 1969 provide for even less." (Aff. of Joseph S. Barbaro, sworn to June 19, 1969)

[11] For example, the United States Department of Labor announced that for the first six months of 1969 the cost of living in the New York City area was increasing at the rate of 6.4% per year, which continued the trend experienced in 1968. New York Times, July 24, 1969, page 1, col. 1.

[12] Unlike the situations in *Harrison* v. *N.A.A.C.P.*, 360 U. S. 167 (1959), and *Fenster* v. *Leary*, 264 F. Supp. 153 (S.D.N.Y. 1966), *aff'd.* 386 U. S. 10 (1967), the facts here reveal a classic instance of the type of special circumstance calling for exercise of federal jurisdiction. See *Baggett* v. *Bullitt*, 377 U. S. 360 (1964); *Dombrowsky* v. *Pfister*, 380 U. S. 479 (1965); and *Zwickler* v. *Koota*, 389 U. S. 241 (1967).

Preliminary Injunction Order.

Plaintiffs having moved this Court for a preliminary injunction staying the enforcement of § 131-a of the New York Social Service Law and regulations promulgated thereunder in a manner which discriminates against recipients of Aid to the Aged, Blind, and Disabled in certain counties outside the City of New York, and defendants having moved this Court for summary judgment, and these motions having been considered by this Court:

Upon the pleadings, affidavits, briefs and oral depositions submitted on behalf of the parties, the hearings held to date, and the opinion of this Court dated August 4, 1969, this Court having found in said opinion that the differential established by § 131-a and regulations promulgated thereunder between public assistance grants to recipients of Aid to the Aged, Blind or Disabled residing in New York City and those to residents of the counties of Dutchess, Greene, Monroe, Nassau, Suffolk, Ulster and Westchester constitutes an arbitrary, invidious and irrational inequality in violation of the Equal Protection Clause, it is

ORDERED, ADJUDGED AND DECREED THAT

1. Pending further order of this Court or termination of this action, defendants, their agents and employees are restrained from the enforcement or implementation of § 131-a of the New York Social Service Law with respect to recipients of Aid to the Aged, Blind and Disabled, or from promulgating schedules of grants and allowances of public assistance or making payments thereof to such recipients, other than according to objective, non-discriminatory standards based upon the cost of the needs of such recipients;

2. Defendants' motion for summary judgment is denied.

Dated: New York, N. Y., September 12, 1969.

PAUL R. HAYS
Paul R. Hays, U.S.C.J.

WALTER R. MANSFIELD
Walter R. Mansfield, U.S.D.J.

CONSTANCE BAKER MOTLEY
Constance Baker Motley, U.S.D.J.

Order to Show Cause—Re: Leave to Intervene.

LET defendants show cause in Courtroom No. 1106 of the United States Courthouse, Foley Square, New York, New York, on the 10th day of October, 1969, at 3:30 P. M. or as soon thereafter as counsel may be heard why an order should not issue or the Court take such other action as shall grant the plaintiffs herein the following relief:

(1) An order pursuant to F.R.C.P., Rule 24 granting plaintiffs Jones and Harvenek leave to intervene in the instant cause of action on behalf of themselves and of all other persons similarly situated, making said persons parties to this cause, and permitting said party plaintiffs to file instanter the complaint herein in the same manner and with like effect as if named an original party to this cause.

(2) An order amending the caption of the instant action to include the two named plaintiffs herein.

(3) A preliminary and permanent injunction restraining and enjoining defendant Wyman, his successors in office, agents and employees, and all persons in active concert and participation with them, from taking any steps toward implementing and enforcing the system of "maximum monthly grants" and schedules of need prescribed by New York Social Services Law § 131-a, added by Laws Ch. 184, March 31, 1969, as amended May 2, 1969, Laws Ch. 411, under the Aid to Dependent Children program.

(4) The convening of a statutory court of three judges for the purpose of hearing and determining this application for a preliminary and permanent injunction in accordance with the provisions of Title 28, United States Code, §§ 2281 and 2284.

(5) An order determining that this action may properly proceed as a class action pursuant to Rule 23 of the Federal Rules of Civil Procedure.

Order to Show Cause—Re: Leave to Intervene.

LET the defendants further show cause why a temporary restraining order pursuant to Title 28 United States Code, § 2284 should not issue restraining the defendant, his successors in office, agents and employees, and all persons in active concert and participation with them, from enforcing the system of "maximum monthly grants" and schedules of need prescribed by New York Social Services Law § 131-a, as amended, pending the hearing and determination of plaintiffs' motion for a preliminary and permanent injunction by a three-judge court convened pursuant to Title 28, United States Code, §§ 2281 and 2284.

Plaintiffs seek this temporary restraining order and preliminary and permanent injunction on the grounds that:

(1) Enforcement of § 131-a, as amended, results in a denial of the equal protection of the laws as guaranteed by the Fourteenth Amendment to the Constitution of the United States and in violation of § 1602(a)(1) of the Federal Social Security Act, 42 U.S.C. § 302(a)(1), and related sections and regulations promulgated thereunder.

(2) Plaintiffs are suffering, and are threatened with, irreparable injury in that as of July 1, 1969, the effective date of § 131-a, they have been without means to provide for themselves and their children the basic necessities of food, clothing and essential medical care, as alleged in the annexed complaint and affidavits of Catherine Jones dated October 3, 1969, Dolores Harvanek, dated October 3, 1969. It is also alleged in the annexed affidavit of Burr C. Hollister, of Counsel to the attorney for plaintiffs, dated October 3, 1969, that immediate action is required to halt implementation of § 131-a, and its consequent irreparable harm.

(3) The issuance of a temporary restraining order and preliminary injunction will not cause undue inconvenience

or loss to the defendants, but will prevent irreparable injury to the plaintiffs.

(4) Plaintiffs have no adequate remedy at law, as set forth more fully in the complaint and affidavits of Catherine Jones and Dolores Harvenek, attached hereto.

IT IS ORDERED that service of this order on defendants at the New York City office at 270 Broadway, New York, New York, or upon the Attorney General of the State of New York, at his office at 80 Centre Street, New York, New York, and upon the attorney for the original named plaintiffs, Lee A. Albert, Esq., at his office Columbia Center on Social Welfare Policy and Law, 409 West 117th Street, New York, New York, and Avram Weisberger, Esq. at his office at City Hall Building, Roosevelt Square, Mount Vernon, New York, on or before the 6th day of October, 1969, be deemed sufficient at 5:00 P.M.

IT IS FURTHER ORDERED that service of this Order may be by any of the attorneys for plaintiffs-applicants to intervene in this action.

Done and ordered at the
United States Courthouse,
Foley Square, New York,
this 6th day of
October, 1969, at
o'clock 2:30 P.M.

/s/ CONSTANCE BAKER MOTLEY,
United States District Judge.

Affidavit of Burr C. Hollister, in Support of Application for Leave to Intervene.

BURR C. HOLLISTER, being duly sworn, deposes and says that:

1. I am an attorney with the Nassau County Law Services Committee, Inc., with offices located at 150 Old Country Road, Mineola, New York and I reside at 20 Wendell Street, Hempstead, New York.

2. I submit this affidavit in support of the motions made by my clients, Catherine Jones and Dolores Harvanek, on behalf of themselves, their children and all other similarly situated in the Aid to Dependent Children program, residing in Nassau and other suburban counties, for (1) leave to intervene in the instant action and to amend the caption herein to include their names as representatives of the Aid to Dependent Children class, (2) a Temporary Restraining Order and immediate convening of a three-judge District Court pursuant to 28 U.S.C. § 2281 and § 2284 and (3) a Preliminary Injunction pursuant to Rule 65 of the Federal Rules of Civil Procedure.

3. Plaintiffs seek a declaratory judgment that New York Social Services Law § 131, as amended, Laws Ch. 184 March 31, 1969, and § 131-a, added Laws, Ch. 184, March 31, 1969, as amended, Laws Ch. 411, May 2, 1969, violate the Social Security Act § 302(a)(1) and the regulations promulgated thereunder, specifically 45 CFR 5233.20, 34 Fed. Reg. 1394 and Handbook of Public Assistance, Pt. 11 § 4000 *et seq.* and the Fourteenth Amendment to the Constitution of the United States insofar as said sections have the effect of denying equal protection of the law to plaintiffs by affording to them a different and lesser quantum of public assistance than is afforded to others similarly situated solely because of their place of residence.

4. Plaintiffs assert that the Social Security Act compels the State of New York, a recipient of funds thereunder, to distribute public assistance under the Aid to Dependent Children Programs, "uniformly"; that differentials are permissible only where there is proven factual justification based on differences in cost; that in fact the cost of living in affluent suburban counties such as Nassau is as high and in some instances demonstrably higher than the cost of living in neighboring New York City; and that accordingly, implementation of the statutory scheme violates plaintiffs' rights under the Fourteenth Amendment of the Constitution and under the Social Security Act.

5. As appeared more fully in the memorandum of Law submitted initially on behalf of the original plaintiffs herein, representatives of persons receiving assistance under the Aid to the Aged, Blind and Disabled program, these standards alter substantially the structure of assistance payments existing in New York State prior to July 1, 1969. Residents of New York City and surrounding suburban counties such as Nassau who were in need, received the same amounts of public assistance at all times prior to July 1, 1969, based on a determination that living costs were the same for all those counties and the City of New York. The new schedules mandated grants for suburban recipients far below those available to New York City residents.

6. On May 2, 1969, the Legislature amended the new § 131-a to permit the State Commissioner of Social Services to authorize higher or lower schedules in areas where costs of living varied from the costs reflected in the legislative schedules. No grants can exceed those established by the Legislature for the New York City.

7. On or about June 5, 1969, defendant Wyman, the Commissioner of the New York State Department of Social Services promulgated a new schedule of grants under which Nassau recipients of Aid to Dependent Children (and certain other suburban residents) receive assistance as follows:

Number of Persons in Household

1	2	3	4	5	6	7	Each Additional
$65	$107	$149	$191	$233	$270	$307	$37

(See Appendix to original complaint herein.)

8. These amounts remain significantly below New York City standards and below living costs in the counties where they are applicable.

9. Plaintiffs-applicants herein receive assistance in the Aid to Dependent Children program in New York State and seek to intervene in order to represnt said ADC class in instant action and to challenge the new legislation as violative of the applicable federal statutory and Constitutional requirements, in an identical manner and capacity as the original plaintiffs proceeded herein. The new legislation enacted by §131-a affects plaintiff-applicants, Jones and Harvanek, in an identical manner, if not more serevely:

(a) the prior schedules and rules applicable to their families prior to July 1, 1969, were the same as those for the AABD categories except that, on one hand, certain recurring specific special allowances were available for blind, aged and disabled persons and, on the other hand, school lunch allowances were available at $6.10 for each child in ADC attending school. Grants for basic maintenance, special diets, special clothing and furniture grants, medical transportation, and so forth were identical for AABD and ADC recipients. See 18 N.Y.C.R.R. 352.4 and 352.5

(8/23/68, replaced by 18 N.Y.C.R.R. 352.4 effective 6/30/69);

(b) the new schedules and regulations, effective July 1, 1969, made no distinction whatever between ADC and AABD recipients and the flat grant amounts are computed based on the same figures;

(c) the ADC families differ only in having more persons figure into the budget computation; since both the reduction in assistance levels and the significant differential in grants between New York City and surrounding suburban counties is reflected in a corresponding and identical manner for all categories of assistance regardless of the number of persons in the family, the position of plaintiffs-applicants Jones and Havanek, is identical in all respects to that of the original plaintiffs. Hence, original plaintiff Rothstein was subjected to a $20.00 cut in her monthly grant and to a $5.00 differential by the new legislation as between New York City and Nassau; plaintiff Harvanek suffered a cut of $69.05 in the family budget plus a differential of $33.00 for the family as a whole, or $4.71 per person, as between New York City and Nassau;

(d) elimination of the special grants for school and camp clothing which are so vital to growing children who outgrow and wear out clothing at a rapid rate, the loss of school lunch allowances, and the lack of medical transportation grants for multiple children have effected a particularly severe hardship upon ADC families, increasing the extremely heavy demands on their already reduced budgets, making the $4.00 or $5.00 monthly differential between a child in New York City and one in Nassau especially injurious and discriminatory;

(e) On September 25, 1969, Commissioner Wyman ordered a special allowance only for AABD recipients of $8.00 for individuals living alone and $5.00 for persons

living with families, effective October 1, 1969, in addition to ordering AABD recipients in SA-1 counties raised to the New York City level. These developments have further heightened the discriminatory effect of the new legislation upon ADC families;

(f) the ADC plaintiffs have a significant interest in the transaction which is the subject matter of this action, the enactment of § 131-a of the Social Service Law, since such families suffered both a cut and discriminatory differential without a rational basis therefor as set forth above; such plaintiffs will certainly be affected and circumscribed by any judgment in this action, and unless intervention herein is permitted, their interests will not be protected; the ADC recipients seek to bring before this Court the peculiarly hard effect of the new legislation upon dependent children at formative, developing stages of their lives, which cannot adequately be done by the originally named plaintiffs;

(g) the claims of AABD and ADC recipients herein present identical questions of law as to the validity of § 131-a of the Social Services Law (compare original complaint with that submitted herewith); requiring ADC recipients to bring a separate action would cause duplication of all matters in separate courtrooms and serious confusion arising out of such parallel processing of identical cases would result; permitting intervention serves the interests of judicial economy and order.

10. Plaintiffs Jones and Harvanek rely upon the proof heretofore submitted by the original plaintiffs, in support of their equal treatment claim;

(1) State standards of assistance in effect prior to July 1, 1969 as to ADC families apply the same standards for New York City and Nassau County families, the only dif-

ference being utility costs. (See schedules for "SA-1" region in 18 N.Y.C.R.R. 352.5).

(2) Handbooks of New York City and Nassau County Departments of Social Services with price guidelines that indicate that costs of vital items of clothing and furniture are identical or higher in suburban counties.

(3) A statistical analysis of public assistance expenditures which indicate that the monthly aid to each recipient as of October 1968 was significantly higher in Nassau and Westchester counties than the monthly aid to recipients in New York City.

(4) A detailed analysis of transportation costs by the Director of the Nassau County Planning Commission establishes the high cost of transportation in Nassau County. (See affidavit of John Burdis attached to plaintiffs' original Memorandum of Law).

(5) The U. S. Labor Department's Consumer Price Index treats the entire metropolitan area as one entity and does not even attempt to assess costs within that area, because both areas are serviced by the same major retail outlets, department stores, supermarkets, etc., who advertise and charge similar prices throughout the metropolitan area. This, together with the mobility of most of the urban-suburban population precludes price variations of any significance within the area.

(6) Commissioner Wyman's deposition covers matters related to costs for all families living in New York City, Nassau and suburban counties. The same factors of legislative failure to investigate into cost of living needs, lack of a cost study (Deposition P. 26), special grants (P. 41), "social cost of urban living" (P. 36), transportation (P. 46), recreation facilities (P. 43, 47) and welfare centers (P. 46), apply with equal force to ADC recipients as in-

dicated by the lack of particular or limiting references to AABD persons in the commissioner's deposition; in fact, specific reference is made to families with ten people (P. 19) and day care center (P. 48) which would apply primarily to ADC families. In effect, Wyman's deposition is proof of the lack of any rationale for the New York City v. Nassau and suburban counties discrimination as to ADC families enacted by the new law.

11. Plaintiffs are recipients of and under the federally reimbursed and supervised categorical program of Aid to Dependent Children:

(a) Prior to July 1, 1969 Plaintiff Jones received $229.75 per month for herself and three children; this amount was cut on July 1, 1969 to $191.00; similarly situated recipients in New York City now receive $208.00 or $4.25 per person more;

(b) Prior to July 1, 1969, plaintiff Harvanek received $376.05 per month for herself and six children; this grant was reduced to $307.00 on July 1, 1969; a similarly situated recipient in New York City now receives $340.00 or $4.71 per person more.

12. These plaintiffs represent the class of recipients receiving Aid to Dependent Children and residing in Nassau County and other SA-1 counties.

13. The severe, irreparable and immediate injury, already found to be caused by the new legislation to the AABD plaintiffs, is present to an even more serious degree for plaintiffs Jones and Harvanek; the loss of special grants for school clothes, school lunches, special medically required diets, telephones and transportation and severe reduction in the regular monthly grant has created great strain and hardship on families with young, growing, for-

native children whose future opportunities in life are dependent upon being presently adequately provided for; the differentials of $4.00 to $5.00 per child and parent between New York City and suburban counties, in the context of a minimal subsistence existence of $45.00 to $47.00 per person per month is causing irreparable harm to suburban residents; in view of this, the fact that, with no cost of living justification, the plaintiffs herein are denied that minimal assistance available to identically situated children in New York City, causes them to suffer an irrational and invidious deprivation and discrimination. The health, well being and future life of such children and their parents are presently being injured by the implementation of § 131-a and said injury will become irreparable and permanent unless that statute's enforcement is enjoined.

14. In view of the recent changes made by Commissioner Wyman, the recurring allowances to recipients in the AABD programs increasing all monthly grants and equalizing suburban counties with New York City, and the lack of any differences between the AABD and ADC categories, the deficiencies and disparities presently being endorsed as to ADC families effects a particularly severe discrimination as to such ADC recipients.

WHEREFORE, plaintiff-applicants-to-intervene respectfully request (1) leave to intervene in the instant action, to file the attached complaint herein, and to amend the caption herein to include the names of Catherine Jones and Dolores Harvanek; (2) a Temporary Restraining Order prohibiting the defendants and his agents from enforcing Section 131-2 of the Social Services Law as to families receiving Aid to Dependent Children living in SA-1 counties, and enjoining the defendants and their agents from promulgating schedules of grants and allowances of

public assistance or making payments thereof to such recipients other than according to objective, non-discriminatory standards based upon the cost of the needs of such recipients; (3) an Order immediately convening a three judge District Court; and (4) a Preliminary Injunction granting the relief requested for the Temporary Restraining Order; (5) such other and further relief as to the Court may seem just and proper.

(Sworn to by Burr C. Hollister, October 3, 1969.)

Affidavit of Catherine Jones.

CATHERINE JONES, being duly sworn, deposes and says:

1. I reside at 71 Laurel Avenue, Hempstead, New York with my three children, Roberta age 16, Melvin age 14, and Elmer age 12.

2. My husband abandoned myself and our children two years ago and has failed to support us. Since that time, I have received public assistance from the Nassau County Department of Social Services in the Aid to Dependent Children Category.

3. My monthly allowance, prior to July 1, 1969, not including rent and fuel, was:

Basic Needs	$207.00
Phone	4.45
School Lunch	18.30
	$229.75

All my children attend school in Hempstead and I have a diabetic condition and high blood pressure for which a special grant was made until December 1968.

4. Commencing July 1, 1969 I have received $191 per month, not including rent and fuel and I have been denied all special grants for my diet, school lunches, and clothing.

5. This reduction has forced me to go frequently without food and to deprive my children of clothing and adequate nutrition. The strain on our family is very great and I do not know if I can hold us together with the pressure of this 12% decrease because my children's needs become greater each day.

6. I urge this Court to grant the relief requested.

(Sworn to by Catherine Jones, October 3, 1969.)

Affidavit of Dolores Harvanek.

DOLORES HARVANEK, being duly sworn, deposes and says:

1. I reside at 99 Park Avenue, Baldwin, New York, with my six children, Edward, age 17, Georgie, age 14, Andrew, age 13, Laura, age 12, John, age 9, and Victoria, age 8.

2. My husband and I separated in 1962 and he has failed to support myself and our children; I am, and have been for several years, receiving public assistance in the Aid to Dependent Children Category from the Nassau County Department of Social Services.

3. Prior to July 1, 1969, I received a monthly grant of $376.05, exclusive of rent and fuel, comprised of Basic needs $335, Phone $4.45 and School Lunch $36, in addition to periodic special grants for clothing as the children's wardrobes became depleted.

4. Since July 1, 1969, the grant for our family has been $307, exclusive of rent and fuel, comprised of a flat grant amount; all special grants for clothing, furniture and transportation have stopped.

5. Georgie, Andrew and I have asthmatic conditions and we require frequent visits to our doctor for shots; Georgie and Victoria have chronic eczema conditions. The strain of the reduction in my budget is causing my family great hardship such that I cannot provide adequately for my children, and it is increasingly difficult to control them if I cannot provide for at least their basic needs.

There is not enough for food or clothing; I had to keep several of my children home from school for a week because they did not have adequate clothing and all of my grant was needed for food and other vital necessities.

6. I urgently plead this Court to provide the relief requested.

(Sworn to by Dolores Harvanek, October 3, 1969.)

Intervenor's Complaint.

I

Plaintiffs on behalf of themselves and all other persons similarly situated seek a declaration that New York Social Services Law, §§ 131 as amended Laws Ch. 184, March 31, 1969 and 131-a added Laws Ch. 184, and as amended Laws Ch. 411, 1969 are in violation of the Fourteenth Amendment to the Constitution of the United States insofar as said sections have the effect of denying equal protection of the law, and are violative of the Social Security Act 42 U.S.C. § 301 et seq. and the regulations promulgated thereunder.

Plaintiffs seek to enjoin any action under the aforesaid Statutes to reduce the quantum of public assistance that they and others similarly situated received prior to July 1, 1969.

II

Preliminary Statement

On March 29, 1969, the Legislature of the State of New York enacted § 131-a of the Social Security Law (see Exh. A orig. complaint) reducing by significant amounts the "standards of need" and actual grants paid to public assistance recipients in New York, as hereinafter more fully set forth. Such reductions were made pursuant to express legislative findings in the Act of a "spiraling rise of public assistance rolls and the expenditures therefor," the "economic concern of the people of the State of New York," and the necessity for the legislature to set "the costs of delivering the needs of public assistance recipients in the respective social services districts of the states." Law Ch. 184, § 1, March 31, 1969.

The aforesaid standards and maximum grants were fully implemented on July 1, 1969.

The New York Act is in direct conflict with the requirements of federal law, denies recipients of public assistance in New York the protections and entitlements afforded them by federal law, and causes serious and irreparable harm to said recipients. Specifically, as hereinafter more fully set forth, the New York requirements unreasonably and irrationally limit standards and maximums of grants to recipients who receive on behalf of themselves and their infant children, Aid to Dependant Children and who reside in Nassau County and elsewhere outside of New York City to levels significantly lower than those applicable to recipients similarly situated who reside in New York City despite similarity in living costs. The latter distinctions violate federal statutory requirements mandating uniform standards of need and maximum grants throughout the state, set forth hereinafter, and additionally, the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

III

Jurisdiction

The jurisdiction of the Court is based upon:

a) 28 U.S.C. §§ 1331, 1337 and 1343

b) 28 U.S.C. §§ 2201 and 2202

c) 42 U.S.C. §§ 1983 and 1988

d) United States Constitution, Article VI and the Fourteenth Amendment

The amount in controversy, exclusive of interests and costs, exceeds $10,000.

IV

Statement of Claim

1. Pursuant to the Social Security Act of 1935, 42 U.S.C. § 301 et seq., New York cooperates with the Federal Government in providing public welfare assistance to needy persons under a New York "state plan", consisting of state statutes and regulations and approved by the United States Department of Health, Education and Welfare. In order to participate in said program New York must comply with all pertinent federal statutes and regulations.

2. Pursuant to the state plan, eligible individuals receive regular recurring semi-monthly or monthly checks for food, rent and other items of basic subsistence. Grants are given for food, household supplies, and recurring personal needs, and a separately computed amount for actual rent and utilities. It is the basic grant for food and recurring needs that is at issue in this case.

3. Prior to September 1968, all recipients in New York State were also eligible for "special needs" grants to provide for lacking, deteriorated or outgrown items of furniture, clothing, kitchen supplies and other items. The provision for such grants recognized that the "regular and recurring" grant did not provide sufficient monies to recipients to permit them to purchase or replace the needed items which were the subject of the "special needs" grants.

4. Among other things, the "special needs" grants provided monies for the purpose of:

(a) Supplying families with an amount for home furnishings and clothing consistent with a minimal standard

of health and decency at the time a family began receiving public assistance and from time to time thereafter.

(b) Replacing essential items of home furnishings and clothing as they became worn out, unsafe, or a hazard to health.

(c) Providing for telephones for those demonstrating medical or other necessity, special diet requirements pursuant to doctor's orders, washing and drying expenses, restaurant meals for those unable to cook at home, travel for welfare and medical business, school lunches for children, layette for new-born infants, job-hunting expenses, school fees, burial expenses, and so forth.

5. On August 27, 1968, as the result of a substantial increase in special needs grants in New York City because of proper payments for legitimate needs, the City effectuated under the guise of a "demonstration project", a substantial reduction in its expenditures and in the amounts paid to many needy families by eliminating all special needs grants for clothing and household furnishings and providing instead a "special flat quarterly grant" totalling $100 per year per recipient allegedly to cover the cost of such items. Said "special flat quarterly grant" is an addition to the "regular and recurring" grant. Recipients continued to remain eligible for grants for the items of special need enumerated in paragraph (4)(c) above.

6. The so-called "special flat quarterly grant" at no time applied to persons residing in counties of New York State other than those constituting the City of New York. Recipients outside of New York City continued to be eligible for all special needs grants. Thus plaintiffs herein continued to receive grants for special needs under the then existing § 131 of the Social Services Law.

7. On or about March 29, 1969, the New York State Legislature, which had previously authorized the State Department of Social Services to establish grant levels, adopted Social Services Law § 131-a and set its own standards of need and maximum grants, exclusive of rent and fuel, for persons living in New York City, as follows:

Number of Persons in Household							
One	Two	Three	Four	Five	Six	Seven	Additional For Each Person
$70	$116	$162	$208	$254	$297	$340	$43

and the following standards of need and maximum grants for recipients outside of New York City:

Number of Persons in Household							
One	Two	Three	Four	Five	Six	Seven	For Each Additional Person
$60	$101	$142	$183	$224	$257	$280	$33

8. (a) Thereafter by Laws, Ch. 411, May 9, 1969, the said section 131-a of the Social Services Law was amended to provide:

> Provided it accords with federal requirements, the regulations of the department shall provide that the commissioner, with respect to any social services district to which subdivision three applies, may promulgate a schedule of monthly grants and allowances for greater or lesser amounts than established by the regulations of the department applicable to such district, but not to exceed the maximums prescribed by subdivision two, for all items of need exclusive of shelter and fuel for heating, if it is established that in such dis-

trict the total cost of the items included in the schedule applicable to such district actually is more or less, as the case may be, than the cost thereof reflected in such schedule. A social services official may, with the approval of the appropriate local legislative body, make application to the department for the promulgation of a schedule pursuant to the subdivision. (See Exhibit B, orig. complaint.)

(b) Thereafter on or about June 5, 1969, a Bulletin (See Exhibit C original complaint), was issued and a schedule (SA-2) was adopted by the New York State Department of Social Services setting forth standards of assistance for recipients of public assistance in Nassau and Westchester Counties and in certain other counties which became effective July 1, 1969, as follows:

One	Two	Three	Four	Five	Six	Seven	For Each Additional Person
$65	$107	$149	$191	$233	$270	$307	$37

(c) As the result of these enactments, the amount for which plaintiffs and their children qualified under law are substantially reduced, as is demonstrated in the tabulation set forth subsequently herein. These reduced "maximum monthly grants" became effective July 1, 1969, and the New York State Department of Social Services and its agents have implemented this entire scheme of assistance to Dependent Children since that date.

9. By adopting § 131-a, the Legislature lowered the standards and significantly reduced the grants available to recipients in the following way, among others:

(a) Cost of living increments which had been added to the "regular recurring" grants are wiped out for numer-

ous families, and the families reduced below standards existing in July 1967.

(b) The "special flat quarterly grant" for New York City residents is abolished.

(c) Recipients living in certain places outside the City of New York, such as plaintiffs who reside in Nassau County and who, prior to July 1, 1969, received "regular and recurring" grants equal to those living in New York City because of equally high or higher living costs, are even further reduced in the standards and grants.

(d) The "special-needs" grants for recipients living outside New York City are abolished.

10. (a) United States Department of Health, Education and Welfare regulation requires that state plans must:

> "Provide that the standard (of assistance) will be uniformly applied throughout the State." 45 C.F.R. § 233.20(a)(2)(iii), 311 Fed. Reg. 1394 (Jan. 29, 1969) and
>
> "Provide that payment will be based on the determination of the amount of assistance needed and that, if full individual payments are precluded by maximums or insufficient funds, adjustments will be made by methods applied uniformly statewide." 45 C.F.R. § 233.20(a)(2)(viii), 311 Fed. Reg. 1394 (JaJn. 29, 1969).

(b) The standards of assistance and maximum grants adopted by the Legislature in § 131-a do not apply uniformly nor are the discriminations in amounts granted based on any rational consideration of living cost. For example, the living costs of plaintiffs, their children and their class who are residents of Nassau County and other

counties outside New York City, are as high or higher than those experienced by residents of New York City and public assistance grants to them were equal. They are no longer so under the new statutory scheme.

11. The reduction in the standard of need will render ineligible for aid needy, dependent families with children whose income and other resources were just below welfare standards and will now equal or exceed the reduced standard.

12. Unless this Court declares the reduction invalid and enjoins the implementation thereof, the aforementioned unlawful result will irreparably and severely harm the plaintiffs, cause extreme hardship on young, growing and disadvantaged children, and handicap the said children so as to seriously prejudice their chances for an adequate, self-sufficient life with equal opportunities.

V

Plaintiffs

1. (a) Plaintiffs are all citizens of the United States and reside in the County of Nassau, State of New York. Plaintiffs bring this action, pursuant to Rule 23 of the Federal Rules of Civil Procedure, on their own behalf and on behalf of all individuals and families similarly aggrieved by the implementation of § 131-a of the New York Social Services Law in violation of the Social Security Act and Federal Regulations.

Plaintiffs are members of a class of recipients of public assistance under the Aid to Dependent Children program residing in Nassau County and other urban and suburban counties other than those within the City of New York, whose grants have been reduced below those of persons

and children with identical need in the City of New York in violation of the Social Security Act and regulations promulgated thereunder, and the Fourteenth Amendment to the Constitution of the United States.

(b) Plai. Is bring this action as a class action because the questions of fact and law are common to the plaintiffs and the class they represent, the members of the class are so numerous as to make joinder of parties impracticable, the claims of the plaintiffs are typical of the claims of all members of the class, the plaintiffs fairly and adequately represent the claims of all the members of the class, the defendant is acting on grounds generally applicable to the entire class, the questions of law and fact common to the class predominate over any quetions affecting individual members, and class action will best provide for a fair and efficient adjudication of this controversy.

2. (a) Plaintiff Catherine Jones is a recipient of public assistance under the Aid to Dependent Children category on behalf of herself and her three infant children, Roberta Jones, age 16, Melvin Jones, age 14, and Elmer Jones, age 12, plaintiff's husband having abandoned the family 2 years ago, and prior to July 1, 1969, received as a monthly grant from the Nassau County Department of Social Services, exclusive of rent and fuel, as follows:

Basic Needs ..... (Plaintiff Jones has a diabetic condition complicated by high blood pressure and until December 1968 received a special diet allowance of $5.00)	$207.00
Phone	4.45
School Lunches	18.30
	$229.75

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(b) Plaintiff Dolores Harvanek is a recipient of public assistance in the Aid to Dependent Children category on behalf of herself and her six children, Edward Jones, age 17, Georgie Jones, age 14, Andrew Jones, age 13, Laura Jones, age 12, John Jones, age 9, and Victoria Jones, age 8 plaintiff's husband having been separated from the family in 1962 by court decree based on cruel and inhuman treatment.

* * * (so in original)

age 8, and received prior to July 1, 1969, a monthly grant from the Nassau County Department of Social Services, exclusive of rent and fuel, as follows:

Basic Needs	$335.00
Phone	4.45
School lunch	36.60
	$376.05 *

3. Under the challenged law these plaintiffs receive assistance at the lower rates provided for recipients residing outside New York City, as set forth:

Plaintiff	*Prior Monthly Grant* *	*New York City Grant*	*Nassau Grant*
Jones	$229.75*	$208.00	$191.00
Harvanek	376.05	340.00	307.00

* Figures do not reflect the amount of periodic special grants for clothing and furniture available under the prior law, which in New York City was simplified to a $100 per year per person flat grant, and which, if applied by analogy to each client's case would average out to an added grant per month of $33.33 for Jones and $58.33 for Harvanek, prior to July 1, 1969.

VI

Defendants

4. The defendant State Department of Social Services, under New York Social Services Law § 20, has primary responsibility for promulgating regulations and instituting procedures for the administration and distribution of public assistance in New York State, in accordance with the requirements of the federal Social Security Act, the Social Services Law of New York, and the Constitutions of New York and the United States.

2. Defendant George K. Wyman, as Commissioner of the Department of Social Services of the State of New York, has primary responsibility for the administration of that Department in compliance with the law. New York Social Services Law § 34.

VII

As a first cause of action

1. Section 131-a violates the Social Security Act of 1935 and the regulations made pursuant thereto because it is not a plan of *uniform statewide application* in that public assistance recipients in Nassau and Westchester Counties and other non-New York City areas are singled out for special, unfavorable and discriminatory treatment.

2. Section 402(a)(1) of the Social Security Act, 42 U.S.C. § 602(a)(1) requires that a state plan "shall be in effect in all political sub-divisions of the state, and, if administered by them, be mandatory upon them." As interpreted by the Department of Health, Education and Welfare in its "Handbook of Public Assistance Administration" (the binding federal regulations of the United States Department of Health, Education and Welfare) the statute requires that the plan "shall . . . provide for administration in accordance with standards that are mandatory and equitable throughout the State." Pt. II § 4200(1) (1964)

3. On January 29, 1969, the Department of Health, Education and Welfare promulgated 45 C.F.R. § 233.20, 34 Fed. Reg. 1394, which provides in pertinent part:

"Section 233.20 Need and Amount of Assistance:

a) *Requirement for State Plans.* A State Plan for OAA, AFDC, AB, APTD or AABD must, as specified below:

Intervenor's Complaint.

1. *General.* Provide that the determination of need and amount of assistance for all applicants and recipients will be made on an objective and equitable basis . . .

2. *Standards of Assistance.* (i) Specify a statewide standard, expressed in money amounts, to be used in determining (a) the need of applicants and recipients and (b) the amount of the assistance payment.

. . . .

iii Provide that the standard will be uniformly applied throughout the State."

4. Although the legislative findings and purpose of the March 29, 1969 Act state that the reductions "will promote greater uniformity and equality of treatment," plaintiffs, as residents of Nassau County, will receive substantially less public assistance under § 131-a than persons identically situated but living within New York City.

5. The cost of living in Nassau County and other surrounding suburban counties is as high as in New York City. The United States Department of Labor, in its statistical analysis of the cost of living, makes no distinction between costs in New York City and neighboring counties. The same supermarket chains and department stores service both areas and charge substantially the same prices for all items, including basic necessities in both New York City and Nassau County. Certain other costs, such as transportation costs are higher in Nassau County.

6. Defendant Wyman previously recognized this absence of cost of living differential in promulgating § 352.4 of Title 18 of the New York Code, Rules and Regulations which established identical standards of need for public

assistance recipients living in New York City, Nassau and other suburban counties.

7. On information and belief, there was neither experience, information nor evidence brought before either house of the New York State Legislature, any committee thereof, or before the defendants justifying or warranting a legislative or administrative finding that there was an actual cost of living differential between New York City and Nassau County.

8. Section 131-a is in direct violation of the federal requirement that standards will be uniformly applied throughout the state, in that it sets different and lower standards for residents of Nassau County and elsewhere without regard to their equal need, and therefore, should be declared invalid and defendants should be enjoined from continuing implementation of the reduction of benefits pursuant thereto.

VIII

As and for a second cause of action

1. Bulletin 134 and the schedules contained therein are in direct violation of the Federal requirement that standards will be uniformly applied throughout the state in that it sets different and lower standards for residents of Nassau County and elsewhere as compared to those for New York City without regard to their equal need, and therefore, should be declared invalid, and defendants should be enjoined from continuing implementation of a reduction of benefits pursuant thereto.

IX

As and for a third cause of action

1. Section 131-a establishes a procedure whereby residents of Nassau County and other areas outside the City of New York must make an affirmative showing of equal need to obtain benefits equivalent to those granted those similarly situated but residents of the City of New York. The statutory scheme prevents plaintiffs from obtaining a greater quantum of assistance even if a showing of greater need is made.

2. The legislative scheme shows a preference for residents of New York City and thus violates both the federal requirements that standards will be applied uniformly throughout the state as provided in 42 U.S.C. § 602 et seq.

X

As and for a fourth cause of action

1. There is no legitimate or rational purpose served by discriminating against public assistance recipients in the Aid to Dependent Children program living outside of New York City, and more particularly in Nassau County and immediate suburban counties.

2. Section 131-a denies plaintiffs and all members of their class the equal protection of the laws in violation of the Fourteenth Amendment, and therefore, should be declared invalid.

XI

Plaintiffs have no adequate remedy at law. Defendant will continue to cause, and threaten to cause, irreparable injury unless enjoined forthwith.

WHEREFORE, plaintiffs respectfully pray on behalf of themselves and all others similarly situated that a three judge District Court be convened for the following purposes:

1. Enter preliminary and permanent injunctions enjoining the defendant, his successors in office, agents and employees, and all other persons in active concert and participation with them, from enforcing or taking any steps in any way toward continuing implementation, as to the class, the system of "maximum monthly grants" and schedules of need prescribed by New York Social Services Law § 131-a, added by Laws Ch. 184, March 31, 1969, as amended by Laws Ch. 411, May 9, 1969, on the ground that said grants and schedules are in violation of and inconsonant with the requirements of the Federal Social Security Act and regulations promulgated thereunder.

2. Enter a declaratory judgment holding that New York Social Services Law § 131-a and the Rules, Regulations, Bulletins and Standards promulgated thereunder denies plaintiffs residing in the Greater New York Area, but outside the City of New York, rights, privileges and immunities secured by the Fourteenth Amendment to the Constitution of the United States, the Federal Social Security Act and regulations promulgated thereunder, insofar as the said § 131-a provides greater benefits for persons in New York City than to persons outside the City of New York, but in the Greater New York Area, despite the similarity in needs and cost of living for the two groups of

recipients, and otherwise invidiously discriminates against plaintiffs and their class.

3. Allow plaintiffs their costs herein and grant them and all other persons similarly situated such additional or alternative relief as the Court may deem to be just and appropriate.

Respectfully submitted,

/s/ CARL RACHLIN,
General Counsel for the
National Welfare Rights Organization,
Attorney for Plaintiffs,
By James Spitzer, Of Counsel.

/s/ LEONARD S. CLARK,
Attorney for Plaintiffs,
By Burr C. Hollister, Of Counsel,
Office & P. O. Address,
Nassau County Law Services Committee, Inc.

EDWARD SPARER,
Attorney for Plaintiffs,
University of Pennsylvania.

Affidavit of Philip Weinberg, in Support of Defendants' Application to Vacate the Order to Show Cause or to Deny the Motion to Intervene.

STATE OF NEW YORK)
COUNTY OF NEW YORK)

PHILIP WEINBERG, being duly sworn, deposes and says:

I am an attorney in the office of Louis J. Lefkowitz, Attorney General of the State of New York, attorney for defendants herein. I make this affidavit in support of defendants' application to vacate the order to show cause signed by the Hon. Constance Baker Motley on October 6, 1969, which ordered defendants to show cause why the application under Rule 24 of the Federal Rules of Civil Procedure made by Catherine Jones and Dolores Harvenek to intervene in the within proceeding should not be granted. In the alternative defendants oppose the application for intervention as untimely made and as an improper belated attempt to enlarge the scope of the instant action.

I

APPLICATION TO VACATE ORDER TO SHOW CAUSE

The instant order to show cause was issued without the slightest showing of the necessity therefor required by the Rules of this Court (Rule 9[4], General Rules, Southern District and Eastern District of New York). It should be vacated on that ground alone. The sense of urgency suggested by plaintiffs is spurious. There is no allegation that these plaintiffs have been prevented from making such an application previously or even that the application necessarily was prepared hastily. Thus the order to show cause was a tactical maneuver in which this Court should not participate.

The history of this case has been one in which plaintiffs have, as if it were a right, invariably proceeded by order to show cause and where time has been of the essence only when the time was necessary for defendants to prepare a defense of the State's statute.

The initial application for temporary restraining order was made by order to show cause signed by Judge Lasker on June 25, 1969. The following day, June 26, defendants were served with a 14 page complaint with 25 pages of exhibits, a 45 page memorandum in support of an application for a temporary injunction and a 2 volume appendix thereto. The motion was returnable on Tuesday, July 1.

On the return date defendants requested an adjournment from the Presiding Judge, the Hon. Constance Baker Motley. This was denied. Judge Motley heard oral argument on the temporary injunction. Defendants asked leave to file papers in opposition thereto and in opposition to the application for a three-judge court. This application was denied from the bench, and thereafter Judge Motley ordered a three-judge court without permitting defendants to file any papers in opposition.

On July 10, deponent was informed by telephone that the three-judge court would convene on July 17. Deponent's request for a short adjournment was denied later that day. Despite the brevity of time for defendants to prepare this complicated case, plaintiffs' application to take the deposition of defendant Commissioner Wyman was granted by Judge Motley on July 14, and scheduled for 2 o'clock on the same day. It was held the next day (July 15) at a considerable inconvenience to the State officials and counsel.

On July 17 plaintiffs' application for a temporary injunction and defendants' application for summary judgment were argued before this Court, and the decision was rendered on August 4. Plaintiffs prepared two proposed orders for settlement on August 12, one of which was re-

ceived by this office on August 11. Despite that fact, defendants' objections to the proposed orders were promptly filed. The order granting the preliminary injunction, entered September 12, was not served until September 19.

On October 5 Judge Motley signed the instant order to show cause, returnable today.

The consistent pattern in this complex case involving a serious challenge to a major State-wide statute and the possible expenditure of large amounts of State moneys has been one of artificial urgency on the part of plaintiffs. Defendants' opportunity to adequately prepare their defense of the statute has been repeatedly sacrificed, when there has not been a similar sacrifice of time by plaintiffs.

Plaintiffs offer no reason whatever to proceed by order to show cause in this instance, as required by Rule 9(c4). The order to show cause should be vacated as improvidently entered.

II

Opposition to Intervention

At all events the motion to intervene must be denied for three compelling reasons. It is not timely made as required by Rule 24. Furthermore, these intervenors are members of a class represented in *Rosado* v. *Wyman*, raising the same issue sought to be litigated here on behalf of AFDC recipients, in which an application for certiorari is pending in the Supreme Court. And most damaging of all, these intervenors are not members of the class that brought this litigation. They receive AFDC, while the present plaintiffs receive Aid for the Aged, Blind and Disabled ("AABD"), and in fact have an actual conflict of interest with plaintiffs' class because they allege that the Aged, Blind and Disabled recently had their prior disability grant ($8 per individual) restored by a demonstration

project which intervenors claim to be discriminatory as against AFDC recipients. (Aff. of Burr. C. Hollister, § 9[e]).

A. *Untimeliness*

Rule 24 requires that an application for intervention be "timely" made. The instant application is definitely out of time. An important substantive decision was made by this Court on August 4, 1969 in granting the preliminary injunction and that injunction will be appealed to the United States Supreme Court. Furthermore, the original date for trial (October 6, 1969) has already passed. It is far too late to bring new parties into the action and to expand its nature.

Timeliness is to be judged from the moment at which intervention was first appropriate. *Walpert* v. *Bart*, 44 F.R.D. 359 (D. Md. 1968). These intervenors could have intervened the day the action began. Their position is in no way different from what it was at the inception of the action. It was plaintiffs who framed this case as one brought by AABD recipients. They may not now transform the nature of the action to cover a different class of plaintiffs. Permissive intervention is allowed only at an early stage of the proceeding. See *United States* v. *Wilhelm Reich Foundation*, 17 F.R.D. 96, 102 (D. C. Me. 1954), aff'd 221 F. 2d 957, cert. den. 350 U. S. 842.

B. *These intervenors are adequately represented in Rosado* v. *Wyman*

This precise claim, that § 131-a denies equal protection to recipients of AFDC in Nassau County, was presented to the three-judge court in the Eastern District of New York in *Rosado* v. *Wyman*, in which an application for certiorari is presently pending in the Supreme Court. Allegations

made by co-counsel Lee A. Albert and others in that case were to the effect that AFDC recipients in New York State (and in Nassau County particularly) were represented in that class action. The order sought in that case would protect the instant intervenors.

Ironically, plaintiffs here went to great lengths to distinguish this action from that of the AFDC recipients in *Rosado*, but now try to avail themselves of a favorable order. Simultaneous litigation of the same issues before two Federal courts is not favored, and the motion to intervene should be denied on that basis alone. *United States* v. *Loew's Inc.*, 20 F.R.D. 423 (S.D.N.Y. 1957).

C. *Intervenors present issues of law and fact different from those presented by the original plaintiffs*

Even if those plaintiffs claim that subsequent actions by the Commissioner have made their situation different from that originally presented in *Rosado* and this Court were to find that that issue was different from that presented to the Supreme Court, AFDC recipients must bring a new action in the District Court. If AABD recipients could bring a new action despite the pendency of *Rosado*, then AFDC recipients must bring a new action notwithstanding the decision in *Rothstein*.

In its decision granting a preliminary injunction this Court relied upon the fact that plaintiffs were AABD rather than AFDC recipients (Opinion pp. 20-22).* Furthermore, an order was sought by plaintiffs which would extend to AFDC recipients and this Court rejected that extension and limited its order solely to the AABD class.

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* We question whether the aged, blind and disabled are able, in view of their physical handicaps, to make any appreciable use of many of the facilities described by the defendant. . . ." (Op. p. 22)

This motion is a disingenuous means of overturning that limitation.

This is so particularly because the intervenors make an additional claim that they are not treated equally with AABD recipients because of a demonstration project instituted by defendant Commissioner on September 25, 1969, after the decision in this case. Thus, there is a conflict of interest between the original plaintiffs and the intervenors, or, at the very least, a different issue of fact and law itself enough to warrant the denial of intervention. *Schockett* v. *Bromley*, 192 F. 2d 257 (10th Cir. 1952) *dism'g app. from Bromley* v. *Sobel*, 101 F. Supp. 116 (D. Colo. 1951); *Mullins* v. *DeSoto Securities Co.*, 2 F.R.D. 502 (W. D. La. 1942), *app. dism.* 136 F. 2d 55; *H. K. Ferguson Co.* v. *Nickel Processing Corp. of New York*, 33 F.R.D. 268 (S.D.N.Y. 1963); *Reynolds Pen Co.* v. *Marshal Field & Co.*, 8 F.R.D. 314 (N. D. Ill. 1948); *Keystone Freight Lines* v. *Pratt Thomas Truck Line*, 17 F. Supp. 635 (W. D. Okl. 1941).

In *Ferguson, supra*, the Government was denied the right to intervene when a motion for interlocutory summary judgment was pending because it sought to raise new defenses. Similarly in *Keystone supra*, the Teamsters Union sought to intervene after a temporary injunction had been granted against union employers by a non-union firm. The Court held that the intervention presented new issues and intervention was refused.

Finally, this Court rejected the legislative finding that the social cost of living in New York City was greater than that in the rest of the State, partly on the ground that such factors, whether valid in the case of AFDC recipients, did not apply to AABD recipients (Opinion p. 22). Considerations of the cost of living differential between Nassau County and New York City AFDC recipients are different from those of AABD recipients, as this Court held.

Order Granting Leave to Intervene and Extending Preliminary Injunction.

This case should not be further complicated at this late stage by the intervention of AFDC recipients in a suit by AABD recipients. Denial of this application to intervene is obviously not a decision on the merits and will not interfere with the intervenors' right to bring an independent action, e.g., *Kennedy* v. *Bethlehem Steel Co.*, 102 F. 2d 141 (3rd Cir. 1939).

WHEREFORE, the within order to show cause should be vacated or, in the alternative, the application to intervene should be denied.

(Sworn to by Philip Weinberg, October 10, 1969.)

Order Granting Leave to Intervene and Extending Preliminary Injunction.

Plaintiff-applicants Catherine Jones and Dolores Harvanek, having moved this Court for leave to intervene into the instant action as party plaintiffs on behalf of themselves and on behalf of all other recipients of public assistance in the Aid to Dependent Children category, who are similarly situated, and said plaintiff-applicants having also moved for a Preliminary Injunction staying the enforcement of § 131-a of the New York Social Services Law and regulations promulgated thereunder in a manner which discriminates against recipients in the Aid to Dependent Children category in certain counties outside the City of New York, and these motions having been considered with due deliberation by this Court:

Upon the pleadings, affidavits, brief and oral depositions submitted initially on behalf of the original parties, the hearings held to date between the original parties, and the pleadings, affidavits and briefs submitted on behalf of the plaintiff-applicants herein, and the affidavit submitted in opposition by the defendants; this Court having found

Order Granting Leave to Intervene and Extending Preliminary Injunction.

in an opinion dated August 4, 1969 that the differential established by § 131-a and regulations promulgated thereunder between public assistance grants to recipients of Aid to the Aged, Blind or Disabled categories residing in New York City and those to residents of the counties of Dutchess, Greene, Monroe, Nassau, Suffolk, Ulster and Westchester constitutes an arbitrary, invidious inequality in violation of the Equal Protection Clause, it appearing to the Court that the said Catherine Jones and Dolores Harvanek should be permitted to intervene as representatives of recipients of Aid to Dependent Children, it is

ORDERED, ADJUDGED AND DECREED that

1. The plaintiff-applicants Catherine Jones and Dolores Harvanek have leave to intervene herein on behalf of themselves and on behalf of all recipients in the Aid to Dependent Children category who are similarly situated, may file instanter their complaint in this cause in the same manner and with like effect as if named as an original party, and are hereby made a party to this cause;

2. The caption of the instant action shall be amended to include the names of the plaintiff-applicants to read:

EDNA ROTHSTEIN, SYLVIA MILLER, HENRIETTA BATSON, CATHERINE JONES and DOLORES HARVANEK, individually and on behalf of all other persons similarly situated,

Plaintiffs,

against

GEORGE K. WYMAN, individually and in his capacity as Commissioner of Social Services for the State of New York, and the DEPARTMENT OF SOCIAL SERVICES for the State of New York,

Defendants.

Order Granting Leave to Intervene and Extending Preliminary Injunction.

3. Pending further order of this Court or termination of this action, defendants, their agents and employees are restrained from the enforcement or implementation of § 131-a of the New York Social Services Law with respect to recipients of Aid to Dependent Children, or from promulgating schedules of grants and allowances of public assistance or making payments thereof to such recipients, other than according to objective, non-discriminatory standards based upon the cost of the needs of such recipients.

Dated: New York, New York, October 20, 1969.

s/ PAUL H. HAYS,
U.S.C.J.

s/ WALTER R. MANSFIELD,
U.S.D.J.

s/ CONSTANCE BAKER MOTLEY,
U.S.D.J.

Letter Containing Opinion of Mr. Justice Harlan Denying Appellants' Application for a Stay Pending Appeal.

Office of the Clerk
Supreme Court of the United States
Washington, D. C. 20543

December 10, 1969

Samuel A. Hirshowitz, Esq.
First Assistant Attorney General
of New York
80 Centre Street
New York, N. Y. 10013

Re: Wyman Et Al. v. Rothstein Et Al.
No. 896, October Term, 1969

Dear Mr. Hirshowitz:

I quote below the order entered today by Mr. Justice Harlan on the application for a stay of the orders of the United States District Court for the Southern District of New York in the above-entitled case:

> "Having duly considered the papers submitted on both sides, I am of the opinion that I would not be justified in granting an interim stay of the orders of the three-judge District Court. Accordingly I deny this application for a stay, without prejudice to the State, if it is so advised, making an application to this Court for an accelerated hearing of its appeal."

Very truly yours,

John F. Davis, Clerk

By E. P. Cullinan
E. P. Cullinan
Chief Deputy

EPC:jmh

cc: Burr C. Hollister, Esq.
150 Old Country Road
Mineola, New York 11501

Affidavit of Joseph S. Barbaro, Attached to Plaintiffs' Memorandum of Law, in Support of a Motion for a Temporary Restraining Order.

STATE OF NEW YORK }
COUNTY OF NASSAU } ss.:

JOSEPH S. BARBARO, being duly sworn, deposes and says:

That he is the Commissioner of the Nassau County Department of Social Services.

That he holds a degree of Master of Science in Social Service from Fordham University and has been the Nassau County Commissioner for more than four years.

That as County Commissioner your deponent has had close contact with the administration of public assistance programs in Nassau County and generally throughout the State of New York. I am familiar with the needs of recipients of public assistance and with the standards of assistance, past and present, as established by the New York State Department of Social Services and local agencies, including Nassau County and the City of New York. Your deponent is also familiar with the provisions of the recent amendments to Section 131a of the Social Services Law of the State of New York and the Regulations, Bulletins and schedules promulgated thereunder which mandate generally reduced standards of public assistance and a lower scedule of maximum monthly grants for recipients residing in Nassau County as opposed to New York City.

That the present standards of assistance provide for life on a level of sustenance, nothing more, and often less. The standards which will go into effect on July 1, 1969 provide for even less. The fundamental goal of the new legislation would appear to be that of providing the least amount of funds to the smallest possible group. Thus, for example, the statute lowers grants, and reduces medicaid payments and eligibility; it requires clients to visit state employment offices every two weeks but fails to pro-

vide for the increased transportation costs which this necessitates.

It cannot be said that this law will take nothing from the poor. The enactment of the flat grant has eliminated the inequitable special grant but has failed to make provision for many special needs such as the special diet allowance for a tuberculosis patient, a low sodium diet for a person with heart disease and the elimination of the telephone allowance for all recipients without regard to the effect on their health and safety. These and numerous other allowances have been removed but not accounted for in the new flat grant.

That the differential in the standard of assistance which is higher for New York City than for the rest of the State, inclusive of Nassau County, is obviously not based on the cost of living or on any other meaningful standard. Based upon professional and personal experience, your deponent verily believes that the cost of maintaining minimally adequate standards of living in Nassau County is at least as high as it is in New York City, and certain costs, such as transporation, are even higher in Nassau County. The New York State Board of Social Welfare has for many years treated New York City and Nassau County the same in its schedule of grants SA-1.

Attached hereto are various proofs prepared with the cooperation of the County Attorney of Nassau County and the Planning Commission of Nassau County which were previously submitted to this Court in a related case which clearly document the lack of foundation for the finding that the cost of living in Nassau County is lower than that in New York City.

That the differential in standards of assistance as contained in Section 131a appears to me to be based on something other than a consideration of need.

(Sworn to by Joseph S. Barbaro, June 19, 1969.)

Affidavit of John Calbreath Burdis, Attached to Plaintiffs' Memorandum of Law, in Support of Motion for Temporary Restraining Order.

STATE OF NEW YORK }
COUNTY OF NASSAU } ss.:

JOHN CALBREATH BURDIS, being duly sworn, deposes and says:

(1) I am Planning Director of the Nassau County Planning Commission which released a report (Nassau County Bus System—An Analysis of Present Service, Technical Report No. 1) in July 1968, analyzing the Nassau County bus transportation system, sponsored in part through a grant from the United States Department of Housing and Urban Development.

(2) The character of the Nassau County transportation system imposes transportation costs on Nassau residents that far exceed those of New York City.

(3) While New York City has a substantially continuous network of public transportation lines (buses and subways) under the centralized supervision of the Transit Authority, generally allowing free transfers between lines at most interfaces, Nassau County, on the other hand, has only a bus system composed of seventeen separately franchised companies. (See Exhibit 1—Existing Bus Routes) with no provision for free transfers between bus lines.

(4) While the New York City Transit Authority imposes a fixed twenty cent fare on travel, even along a singular route, Nassau County transit fares vary and are almost always in excess of the city fare.

(5) The number and variety of the bus companies in Nassau County uually require commuters to make numerous expensive and time-consuming transfers in order to travel relatively short distances. Such conditions impose

greater costs of time and money on Nassau residents who attempt to use public transportation facilities than are borne by comparable New York City residents. For example (as described more fully in Exhibit 2), an analysis of the minimum cost and time to travel from various poverty areas throughout Nassau County to the Meadowbrook Hospital (which is the primary County medical facility), assuming all connections are made, reveals the following:

Origin	*Number of Buses*	*Cost*	*Time*
Great Neck	5	$1.70	1 hr. 32 minutes
Pt. Washington	3	1.31	1 hr. 9 minutes
Glen Cove	2	.75	1 hr. 25 minutes
New Cassel	2	.65	37 minutes
Inwood	3	1.11	1 hr. 23 minutes
Long Beach	2	.85	1 hr. 35 minutes
Freeport	2	.60	40 minutes

Similar difficulties present themselves to welfare recipients attempting to travel to various other points throughout Nassau County for other necessary purposes. (See Exhibit 3).

(6) On Sundays, bus service is seriously curtailed throughout the County and for residents of such poverty communities as Inwood, Glen Cove, Great Neck, Port Washington and New Cassel, service is virtually nonexistent. (See Exhibit 4—Sunday Service).

(7) Moreover, many residents of poverty communities are so removed from regular bus routes that they can be said to have no reasonable access to bus service at all. (See Exhibits 3 and 5). Consequently, they must depend regularly on use of other modes of transportation, including taxicabs, with an even greater cost for travel.

(Sworn to by John Calbreath Burdis, April 29, 1969.)

Letter From James Callison to George K. Wyman, Dated November 10, 1969 Submitted by Plaintiffs to This Court by Letter Dated January 7, 1970

DEPARTMENT OF HEALTH
EDUCATION, AND WELFARE
SOCIAL AND REHABILITATION SERVICE
New York, N. Y., November 10, 1969.

Re Submittal No. S-33-69.

Mr. GEORGE K. WYMAN,
Commissioner, New York State Department of Social Services, 1450 Western Avenue, Albany, New York 12203.

DEAR MR. WYMAN: The schedules of monthly grants and allowances set forth in the above raise a question as to whether there is provision in the New York State plan for use of a statewide standard in determining need and payments with any variation in amounts for localities based on local differences in the cost of the items in the standard (P.R. 20-7).

In this regard, we do not question that section 131-a(4) of the Social Services law would authorize a method of operation which is consistent with state-wideness requirements. However, there must be assurance that in implementing such provision, you will undertake to maintain the proper relationship to local costs and to exercise your power to promulgate revised schedules in any case in which you determine such revision is called for, i.e., that such action is not dependent on a request or application therefor by local authorities.

The regulations which you have promulgated establish four schedules of monthly grants and allowances as opposed to the former three schedules. The additional schedule results from splitting districts which were previously

Letter From James Callison to George K. Wyman, Dated November 10, 1969 Submitted by Plaintiffs to This Court by Letter Dated January 7, 1970.

included in one class; New York City is now treated separately from the Counties of Dutchess, Greene, Monroe, Nassau, Suffolk, Ulster and Westchester. Grants in the latter counties will now be approximately $4.50 lower per person than in New York City. The fact that all these counties were previously classed together with New York City would itself constitute some evidence that you have previously found the cost of the items contained in the standard to be virtually the same in all these areas, and would therefore indicate the need for specific supporting data as to the basis for this particular differentiation.

In addition, analysis of the schedules as against the pre-added monthly allowances previously payable to families in which the oldest child was ten or eleven shows a much higher increase for New York City than for any other district. In this connection, it is noted that while the previous difference between SA-1 and SA-3 schedules for the highest and lowest cost districts amounted usually to between $6 and $8 in comparable family units, the difference now ranges from $15 in a 2-person family to $39 in a family of seven. Also, while the previous schedules provided a uniform figure of $32 for additional persons, the new schedules provide $43 in New York City and $37 in every other district.

In your letter of June 2, 1969, you indicate that the differentiation between New York City and the rest of the State is based upon "its size and complexity, resulting in special requirements for transportation to use available services." It is difficult to understand how transportation costs could account for the differentiation in grant levels. Moreover, such differentiation does not appear to be supported by the most recent information (Autumn 1968) from the Bureau of Labor Statistics on living costs within

Letter From James Callison to George K. Wyman, Dated November 10, 1969 Submitted by Plaintiffs to This Court by Letter Dated January 7, 1970.

the State, e.g., such costs in Buffalo as compared to New York City.

In summary, the State standard must represent items of need to be made available to all recipients statewide. Differences in money amounts, if they exist, must result from demonstrable differences in the cost of these items in various sections of the State. Given the materials submitted to date, we are unable to find that there is in effect a statewide standard being uniformly applied throughout the State. We will, of course, give full consideration to any other information or comments which you may wish to submit.

We would appreciate as prompt a response as possible, whether in the form of a written reply or by way of a meeting with your staff.

Sincerely yours,

JAMES CALLISON,
Regional Commissioner.

Price Guide—Clothing & Household Furnishings, Nassau County Dept. of Social Services, Oct. 1, 1968 (Appended to Plaintiffs' Memorandum of Law).

NASSAU COUNTY DEPARTMENT OF SOCIAL SERVICES

HOME ECONOMICS AND MANAGEMENT

FAMILY AND CHILDREN SERVICES

PRICE GUIDE—CLOTHING AND HOUSEHOLD FURNISHINGS

Effective October 1st, 1968.

2% New York State Tax to be added unless purchases are paid directly by the Department to Vendor.

Price Guide—Clothing & Household Furnishings, Nassau County Dept. of Social Services, Oct. 1, 1968 (Appended to Plaintiffs' Memorandum of Law).

PRICE GUIDE FOR ITEMS REQUIRED BY INFANT AT BIRTH—Layette

Article	*Maximum Quantity*	*Unit Price*
OUTWEAR		
Dress and slip or suit	1	$4.00
Sweater set—including cap and booties	1	3.00
Jump suit	4	1.30
UNDERWEAR		
Diapers	3 doz.	2.75
Pants—water repellent	1	.60
Shirts—cotton—short sleeves or	3	.80
Shirts—cotton—sleeveless	3	.55
Slip—cotton	1	1.00
FOOTWEAR		
Socks—cotton	3	.35
MISCELLANEOUS		
Pad—waterproof—crib size	1	1.80
Pads—cotton quilted—18" square	4	.80
Receiving blankets—flannelette	4	.70
Crib blanket	1	3.00
Towel and wash cloth set	1	2.00
INCIDENTAL ITEMS		
Baby oil	10 oz.	.80
Cotton	4 oz.	.60
Diaper pins	Card—4 pins	.25
Soap—white—unscented	1 large bar	.20
Bottle brush, nylon	1	.50
Funnel	1	.45
Measuring pitcher	1	.55
Measuring spoons	1 set	.30
Nursing bottles (complete, includes nipples and nipple caps)		
8 oz. heat-resistant glass	8	.40
4 oz. heat-resistant glass	4	.40
Diaper pail and cover	1	3.00

Effective 10/1/68 2% Sales Tax to be Added

Price Guide—Clothing & Household Furnishings, Nassau County Dept. of Social Services, Oct. 1, 1968 (Appended to Plaintiffs' Memorandum of Law).

GUIDE FOR ESTIMATING NEEDS OF INFANT

	Article and Description	*Maximum Quantity*	*Unit Price*
Other Supplies which May be Required	Bath towels, terry cloth	4	$ 1.00
	Bathtub, oval shape, plastic	1	3.00
	Bunting	1	4.00
	Carriage Pad	1	4.00
	Mattress Pad—filled, quilted cotton	1	2.00
	Sheets—fitted	4	1.50
	Sheeting—water-repellent 36" x 54"	2	1.80
	Toilet seat	1	3.00
	Washcloths, cotton-knit	4	.25
	Sterilizer	1	3.50
Furniture	Carriage	1	25.00
	High Chair	1	14.00
	Crib and Mattress	1	35.00
	Mattress, to fit crib 54" x 30"	1	12.00
	Pad for Play Pen	1	4.00
	Play Pen, approx. 40" x 40"	1	19.00
	Stroller single	1	17.00
	" twin size	1	35.00
	" Two-seater	1	21.00
	Gate	1	4.00

Effective 10/1/68 2% sales tax to be added

Price Guide—Clothing & Household Furnishings, Nassau County Dept. of Social Services, Oct. 1, 1968 (Appended to Plaintiffs' Memorandum of Law).

PRICE GUIDE FOR CLOTHING ITEMS

Children—Birth through Five Years

Items	*Price*
Cotton jersey	$ 1.70
Cotton suit	4.00
Cotton dress	3.00
Slip	1.30
Overalls—summer or dungarees	2.00
Overalls—winter or dungarees	3.00
Sweater	4.00
Cap	2.00
Light jacket	3.00
Mittens	1.00
Snow suit	13.00
Raincoat	4.00
Play shorts	1.50
Swim suit	3.00
Bathrobe	4.00
Bedroom slippers	2.00
Pajamas—summer	2.00
Pajamas—winter	2.00
Under pants	.55
Under shirt	.65
Socks	.40
Galoshes	4.00
Rubbers	2.30
Shoes	7.00
Sneakers	3.00
Stretch pants	3.00
Skirt	3.00
Blouse	2.00
Spring coat	11.00

2% sales tax to be added

10/1/68—Home Economics and Management

Price Guide—Clothing & Household Furnishings, Nassau County Dept. of Social Services, Oct. 1, 1968 (Appended to Plaintiffs' Memorandum of Law).

PRICE GUIDE FOR CLOTHING ITEMS

GIRLS

Item	*6 thru 11*	*12 thru 15*	*16 thru 18*
Blouse	$ 2.00	$ 3.00	$ 3.00
Cotton Dress	4.00	6.00	7.00
Cotton jersey—short sleeves	2.00	2.50	3.00
Dressy dress	7.00	9.00	10.00
Dungarees	3.50	4.00	4.00
Hat	3.00	3.00	3.00
Play shorts	2.00	3.00	3.00
Raincoat	5.00	5.00	5.00
Skirt or stretch pants	4.00	5.00	5.00
Spring Coat	15.00	20.00	20.00
Sweater	4.00	4.00	5.00
Swimsuit	4.00	9.00	9.00
Winter coat	20.00	25.00	30.00
Ski Pants	5.00	—	—
Bathrobe	4.00	5.00	5.00
Bra	—	1.60	1.60
Girdle	—	3.00	3.00
Pajamas—summer	2.00	3.00	3.00
Pajamas—winter	2.00	3.00	3.00
Slip	2.00	2.00	2.50
Socks	.40	.40	.40
Stockings	——	.70	.70
Under pants	.55	.60	.60
Under shirt	.70	—	—
Bedroom slippers	2.00	2.00	2.00
Galoshes	4.00	4.00	4.00
Rubbers	3.00	3.00	3.00
Shoes	6.00	7.00	8.00
Sneakers	3.00	3.00	3.00
Gloves	1.50	1.50	1.50
Jacket, light	4.00	4.00	5.00
Sweat Shirt	1.75	2.00	—

Eff. 10/1/68—Home Economics and Management

2% New York State Tax to be Added

Price Guide—Clothing & Household Furnishings, Nassau County Dept. of Social Services, Oct. 1, 1968 (Appended to Plaintiffs' Memorandum of Law).

PRICE GUIDE FOR CLOTHING ITEMS

Boys

Item	Price *6 thru 11*	*12 thru 15*	*16 thru 18*
Cotton jerseys	$ 2.00	$ 3.00	$ 3.00
Dungarees	3.50	4.00	4.00
Hat or cap	2.00	2.00	2.00
Light jacket	4.50	5.00	7.00
Play shorts	2.00	3.00	3.00
Raincoat	4.00	5.00	5.00
Shirt	3.00	3.00	3.00
Slacks — summer	4.00	5.00	5.00
Slacks — winter	5.00	6.00	6.00
Suit	20.00	25.00	30.00
Sweater	5.00	6.00	6.00
Swim suit	2.50	3.00	3.00
Winter coat	15.00	20.00	25.00
Bathrobe	4.00	5.00	5.00
Pajamas — summer	2.60	3.00	3.00
Pajamas — winter	3.00	3.00	3.00
Socks	.50	.50	.60
Under pants	.65	.70	.80
Under shirts	.65	.70	.80
Bedroom slippers	3.00	3.00	3.00
Galoshes	5.00	5.00	5.50
Rubbers	3.00	3.00	4.00
Shoes	7.00	9.00	10.00
Sneakers	4.00	4.00	4.00
Gloves	1.50	1.50	1.50
Ski pants	7.00	—	—
Sweat shirt	1.75	2.00	2.00

Eff. 10/1/68 Home Economics and Management

2% Sales Tax to be added

Price Guide—Clothing & Household Furnishings, Nassau County Dept. of Social Services, Oct. 1, 1968 (Appended to Plaintiffs' Memorandum of Law).

PRICE GUIDE FOR CLOTHING ITEMS—(Continued)

Women

Article	Unit Prices	
	Regular Size	*Outside 46-60*
Outerwear		
Blouse, cotton jersey	$ 3.00	$ 7.00
Coat — spring	25.00	35.00
Coat — winter	35.00	45.00
Dress — cotton	5.00	5.00
Dress — dressy	9.00	15.00
Hat	4.00	4.00
Raincoat	6.00	10.00
Skirt	6.00	8.00
Suit	30.00	38.00
Sweater	5.00	8.00
Play shorts	3.50	5.00
Swim suit	11.00	16.00
Slacks — summer	4.00	
winter	5.00	
Underwear		
Bathrobe	6.00	8.00
Brassiere	3.00	5.00
Girdle	5.00	11.00
Nightgown — summer	3.00	3.00
Nightgown — winter	3.00	3.00
Panties	.75	1.40
Slip	3.00	5.00
Footwear		
Galoshes	4.00	4.00
Rubbers	3.00	3.00
Shoes	9.00	14.00
Slippers	3.00	3.00
Stockings	.80	1.25

2% Sales Tax to be added

Effective 10/1/68

Price Guide—Clothing & Household Furnishings, Nassau County Dept. of Social Services, Oct. 1, 1968 (Appended to Plaintiffs' Memorandum of Law).

PRICE GUIDE FOR CLOTHING ITEMS — (Continued)

MEN

ARTICLE	UNIT PRICES	
	Regular Size	*Outsize 48-60*
OUTERWEAR		
Coat — winter (suburban type)	$25.00	$25.00
Hat or cap	4.00	4.00
Jacket — light	8.00	12.00
Raincoat	18.00	25.00
Shirt and cotton jersey	3.00	7.00
Suit	48.00	62.00
Sweater	7.00	12.00
Trousers — summer	5.00	7.00
Trousers — winter	7.50	12.00
Play shorts	4.00	11.00
Swim suits	3.00	7.00
UNDERWEAR		
Bathrobe	5.00	9.00
Pajamas — summer	3.50	5.00
Pajamas — winter	4.00	6.00
Shirt	.90	1.40
Shorts	.90	1.65
FOOTWEAR		
Galoshes	5.50	8.00
Rubbers	4.00	5.00
Shoes	10.00	10.00
Slippers	3.00	4.00
Socks	.60	.60

2% Sales Tax to be added

Effective 10/1/68

Price Guide—Clothing & Household Furnishings, Nassau County Dept. of Social Services, Oct. 1, 1968 (Appended to Plaintiffs' Memorandum of Law):

PRICE GUIDE FOR HOUSEHOLD FURNITURE, FURNISHINGS AND EQUIPMENT

HOUSEHOLD FURNISHINGS AND EQUIPMENT

Items	*Unit Price*
Cleaning and Laundry Equipment	
Broom	$ 1.75
Clothes line (100 ft.)	1.75
Clothespins, per dozen	.25
Drying rack	4.00
Dust mop	1.85
Dust pan	.50
Electric iron	11.00
Ironing Board	7.00
Ironing Board pad and Cover	2.00
Laundry bag	2.00
Mop head	.85
Mop stick	.70
Pulley and hooks, pr.	.80
Scrub brush	.40
Toilet brush	.50
Utility pail	1.00
Whisk broom	.85
Clothes hamper	3.00
Cooking Equipment	
Baking Dish	1.30
Bread board	1.00
Butter dish with cover	.40
Cannister set	4.00
Cakepan	1.00
Can Opener	.35
Cookie sheet	1.00
Dishpan, plastic	1.00
Double boiler with cover, 2 qt.	3.60
Egg beater, rotary type	1.30

Items	*Unit Price*
Tableware	
place setting per person (knife, fork, tablespoon, teaspoon)	1.50
Fork	.30
Knife	.60
Tablespoon or soup spoon	.30
Teaspoon	.30
Cutlery per family	4.00
Dishes	
Place setting per person (Dinner plate, soup plate sauce dish, cup and saucer)	2.00
Cup and Saucer	.60
Dinner plate	.50
Sauce dish	.40
Soup or cereal bowl	.50
Water pitcher	1.20
Platter	1.15
Serving bowl	1.05
Glassware	
Sugar bowl and creamer	.75
Water tumbler	.15
General Furnishings	
Clock, alarm	3.00
Curtain rods	.40
Electric bulbs	.30
Electric fan	16.00
Shades, window (6 ft.) (45" wide)	2.65 4.00

Effective 10/1/68 2% Sales Tax to be Added

Price Guide—Clothing & Household Furnishings, Nassau County Dept. of Social Services, Oct. 1, 1968 (Appended to Plaintiffs' Memorandum of Law).

HOUSEHOLD FURNISHINGS AND EQUIPMENT

Items	*Unit Price*
Electric grill, 1-burner	4.00
2-burner heat controlled	14.00
Frying pan, 10″	2.50
Garbage can and cover 10 qt.	3.00
Kitchen fork	.50
Kitchen knife	1.30
Kitchen spoon	.50
Marketing cart	5.00
Measuring cup	.40
Measuring spoons, plastic	.30
Mixing bowls, set of 3 ovenproof glass	$ 2.95
Muffin pan, 12-cup	1.00
Paring knife	.45
Pie plate	.50
Potato masher	.55
Refrigerator dish, plastic	.45
Roasting pan	2.00
Saucepan with cover, 2 Qt.	2.00
Saucepan with cover, 5-6 Qt.	4.50
Spatula or turner	.50
Strainer, large size	.80
Teapot or coffee pot	2.00
Toaster electric	11.00
Toilet tissue holder	.75
Toilet seat	5.00
Window screens	3.00
Radio	16.00
Watch	10.00
MISCELLANEOUS	
Bed pan	6.00
Sewing machine	40.00
Scissors	2.50
Electric Heater	27.00
Heating pad	6.00
Suitcase	10.00
Lawn mower	20.00
Vacuum cleaner	$ 25.00
Washing machine, non-automatic, new	140.00

Effective 10/1/68 2% Sales Tax to be Added

Price Guide—Clothing & Household Furnishings, Nassau County Dept. of Social Services, Oct. 1, 1968 (Appended to Plaintiffs' Memorandum of Law).

PRICE GUIDE FOR HOUSEHOLD FURNISHING AND EQUIPMENT

PRICE GUIDE FOR HOUSEHOLD, FURNISHINGS AND EQUIPMENT

Kitchen	*Unit Price*
Table	$ 10.00
Large dinette table	19.50
Dinette set (table and 4 chairs)	39.00
Chair—straight	5.50
Cabinet, storage	15.00
Refrigerator	100.00
Range, electric	130.00
Range, gas	130.00
Cushion replacements for dinette set	3.00
Living Room	
Chair (upholstered seat 4 open arms)	25.00
Chair, straight	10.00
Lamp	5.00
Sofa	75.00
Hi Riser	85.00
Studio Couch	49.00

Bedroom	*Unit Price*
Bed, single (complete & set up)	$ 53.50
Bed, double (complete & set up)	53.50
Bunk beds (complete & set up) (All mattresses have 5 year guarantee)	108.00
Folding bed	30.00
Bed—headboard	8.00
Steel bed frame	10.00
Springs	26.00
Mattress	26.00
Legs for springs	6.00
Rug, washable	4.00
Chest of drawers	29.00
Wardrobe	20.00
Mirror	10.00
Lamp	3.00
Miscellaneous (cont'd)	
Bath mat	3.00
Laundry basket	3.00
Laundry tub	4.00
Dish rack	2.00
Mail box	5.00
Guard rails—bed	5.50
Tapes—venetian blinds	1.25
Slip cover—chair	6.00
Slip cover—couch	12.00
Window guards	7.00

2% Sales tax to be added

Effective 10/1/68

Price Guide—Clothing & Household Furnishings, Nassau County Dept. of Social Services, Oct. 1, 1968 (Appended to Plaintiffs' Memorandum of Law).

PRICE GUIDE FOR HOUSEHOLD FURNITURE, FURNISHINGS AND EQUIPMENT

HOUSEHOLD LINENS

Item	Quantity When Needed	Price	
Bedspread	1 per bed	$ 6.00	
Blankets	2 per bed—1 heavy	7.00	
	—1 light	5.00	
Curtains	1 pair per window	4.00	
Curtain, shower	1	3.00	
Dishcloth	2 per family	.30	
Pillow	1 per person	3.00	
Pillowcases	2 per pillow	.70	
Sheets, double	3 per bed	2.75	
single	3 per bed	2.30	
Sheeting, rubber	2 yards for bed	2.00	Per Yard
Tablecloth	2	3.50	
Towels, bath	2 per person	1.00	
hand	2 per person	.70	
kitchen	1 per person	.35	
Washcloth	2 per person	.40	
Drapes	in place of shades for wide windows	6.00	
Special Bedding			
Bedboard, double (Medical Need)	1	11.50	
Bedboard, single (Medical Need)	1	7.00	
Mattress cover for allergic person	1 per mattress	4.50	
Pillow, foam rubber for allergy	1 per person	4.00	
Pillowcase for allergic person	1 per pillow	.75	

Eff. 10/1/68 2% Sales Tax to be Added

Handbook for Case Units, New York City Dept. of Social Services, Jan., 1968 (Appended to Plaintiffs' Memorandum of Law).

PRICE GUIDE FOR CLOTHING ITEMS

MAN

The number of items listed under maximum quantity provides an adequate basic supply to be granted at any one time and to which additional quantities can be added with the use of the recurring grant.

Maximum Quantity	ARTICLE	UNIT PRICES *Regular Size*	*Outsize 48-60*
	OUTERWEAR		
1	Coat-winter (suburban type)	$25.00	$25.00
1	Hat	7.00	7.00
1	Jacket — light	8.95	17.90
*1	Raincoat	18.00	26.95
3	Shirt	3.00	6.95
1	Suit	47.45	62.45
1	Sweater	9.00	12.00
1	Trousers — summer	5.70	6.95
1	Trousers — winter	7.50	11.95
	UNDERWEAR		
1	Bathrobe	6.00	9.00
2	Pajamas — summer	3.45	4.95
2	Pajamas — winter	4.00	5.95
3	Shirt	.90	1.40
3	Shorts	.90	1.65
	FOOTWEAR		
1	Galoshes	5.50	7.95
1	Rubbers	4.15	4.95
1	Shoes	10.00	10.00
1	Slippers	3.00	4.00
3	Socks	.60	.60

* Only if employed

5% Sales and Use Tax to be Added

Handbook for Case Units, New York City Dept. of Social Services, Jan., 1968 (Appended to Plaintiffs' Memorandum of Law).

PRICE GUIDE FOR CLOTHING ITEMS — (Continued)

WOMAN

The number of items listed under maximum quantity provides an adequate basic supply to be granted at any one time and to which additional quantities can be added with the use of the recurring grant.

Maximum Quantity	ARTICLE	UNIT PRICES *Regular Size*	*Outside 48-60***
	OUTERWEAR		
*1	Blouse	$ 3.85	$ 7.00
1	Coat — spring	25.95	35.00
1	Coat — winter	40.00	45.00
2	Dress — cotton	4.00	4.00
1	Dress — dressy	10.00	15.00
1	Hat	4.00	4.00
*1	Raincoat	3.00	5.00
*1	Skirt	6.00	8.00
*1	Suit	30.00	38.00
1	Sweater	5.40	8.00
	UNDERWEAR		
1	Bathrobe	6.00	6.00
2	Brassiere	4.00	6.00
1	Girdle	8.00	11.00
2	Nightgown — summer	3.00	3.00
2	Nightgown — winter	3.00	3.00
3	Panties	.65	1.40
2	Slip	3.00	5.00
	FOOTWEAR		
1	Galoshes	4.00	4.00
1	Rubbers	4.00	4.00
1	Shoes	9.00	9.00
1	Slippers	3.50	3.50
2	Stockings	.75	1.25

* Only if employed

** For Tall sizes, see Home Economist.

5% Sales and Use Tax to be Added

Handbook for Case Units, New York City Dept. of Social Services, Jan., 1968 (Appended to Plaintiffs' Memorandum of Law).

~~PRICE GUIDE~~ FOR HOUSEHOLD FURNITURE, FURNISHINGS AND EQUIPMENT

LIST I. FURNITURE
(Reconditioned, unless otherwise indicated)

Article	*Unit Price*
LIVING ROOM	
Couch	
*Spring on legs with new cotton linters mattress	$30.00
**Hi Riser with new cotton linters mattress	50.00
Chair—occasional (upholstered seat and open arms)	15.00
Table—drop leaf or extension (wood)	15.00
Table—end	10.00
Lamp—table type (with shade)	4.00
Lamp—floor type (with shade)	6.00
Lampshade	2.00
KITCHEN	
Table—extension type (porcelain)	12.00
Dinette set (table and 4 chairs)	27.00
Chair—straight	5.00
***Cabinet—storage (new, metal)	12.00
***Refrigerator—electric (8-10 cu. ft.)	75.00
***Gas Range—4-burner, oven (30" wide)	45.00
Linoleum (new)—per sq. yd.	1.00
Cost of laying—per sq. yd. ($5.00 minimum)	.25
Linoleum rug (new) 6 x 9 ft.	8.00
9 x 12 ft.	12.00
9 x 15 ft.	15.00
12 x 12 ft.	16.00
12 x 15 ft.	18.00
Linoleum runner (new)—per yd. (36" wide)	1.00

Article	*Unit Price*
BEDROOM	
Bed—single (complete with spring and new cotton linters mattress)	$33.00
Bed—double (complete with spring and new cotton linters mattress)	35.00
Bunk bed (new, complete with spring and new cotton linters mattress)	60.00
Folding bed (new cotton linters mattress)	
single—30"	20.00
double—48"	29.00
Bedstead—single or double	12.00
Spring—coil	15.00
Spring on legs	15.00
Legs for springs (4)	6.00
Mattress (new, cotton linters, rolled edges)	
single	20.00
double	23.00
bunk bed size	15.00
Chest of drawers—3 drawers	15.00
4-5 drawers	20.00
Mirror	4.00
Wardrobe (new) metal or wood	20.00
Rug (new) washable	4.00

* Can be used for sitting or sleeping.
** Only if necessary for sleeping two in living room.
*** If not provided by landlord.

5% Sales and Use Tax to be Added

Revised April, 1966

Handbook for Case Units, New York City Dept. of Social Services, Jan., 1968 (Appended to Plaintiffs' Memorandum of Law).

PRICE GUIDE FOR HOUSEHOLD FURNITURE, FURNISHINGS AND EQUIPMENT—(Continued)

LIST II. HOUSEHOLD FURNISHINGS AND EQUIPMENT

Items	*Unit Price*
CLEANING AND LAUNDRY EQUIPMENT	
Dust pan	$ .50
Broom	1.40
Dust mop	1.60
Utility pail	.95
Scrub brush	.30
Mop head	.80
Mop stick	.50
Electric iron automatic, dry	7.95
Ironing board	9.00
Ironing board pad and cover	1.45
Drying rack, metal	3.90
Washboard	.70
Clothes line (100 ft.)	1.50
Pulleys and hooks, pair	.55
Clothespins, per dozen	.15
Whisk broom	.80
Toilet Brush	.40
COOKING EQUIPMENT	
Double boiler with cover, 2 qt.	3.00
Saucepan with cover, 2 qt.	2.00
Saucepot with cover, 5-6 qt.	3.20
Frying pan, cast iron—10"	2.50
Roasting pan	2.00
Muffin pan, 12 cup	.80
Mixing bowls, set of 3, ovenproof glass	2.45
Measuring cup, metal	.40
Measuring spoons, plastic	.20
Butter dish with cover	.30
Teapot or coffee pot	1.90
Kitchen fork	.50
Kitchen knife	1.60
Kitchen spoon	.50
Paring knife	.45
Spatula or turner	.50
Potato masher	.55
Egg beater, rotary type	1.00
Can opener	.30
Strainer, large size	1.05
Fruit reamer, glass	.40
Refrigerator dish, plastic	.30
Dishpan, plastic	.75
Garbage can and cover, 10-qt.	2.00
Electric grill, 1-burner	3.50
Electric grill, 2-burner, heat controlled	11.45
Marketing cart	3.00
DISHES	
Place setting per person	$ 2.00
Includes items below:	
Dinner plate	.70
Soup or cereal bowl	.40
Sauce dish	.35
Cup and Saucer	.55
Serving dishes per family of 2 or more	
Includes items below:	
Serving bowl	1.00
Platter	1.00
GLASSWARE	
Water tumbler	.15
Sugar bowl and creamer	.70
CUTLERY—Stainless Steel	
Place setting per person	1.75
Includes items below:	
Knife	.65
Fork	.40
Table or soup spoon	.40
Teaspoon	.30
GENERAL FURNISHINGS	
Shades, window (6 ft.)	2.80
Window screens	1.50
Curtain rods	.50
Towel rack	.95
Toilet tissue holder	.55
Clock, alarm	3.00
Electric bulbs	.25
MISCELLANEOUS	
Sewing machine, reconditioned	40.00
Washing machine, non-automatic —new	120.00
Suitcase	6.50

5% Sales and Use Tax to be Added

Revised, April, 1966

Handbook for Case Units, New York City Dept. of Social Services, Jan., 1968 (Appended to Plaintiffs' Memorandum of Law).

PRICE GUIDE FOOR HOUSEHOLD FURNITURE, FURNISHINGS AND EQUIPMENT—(Continued)

List III. Household Linens

Item	*Quantity*	*Description*	*Unit Price*
Bedspread	1 per bed	Cotton chenille or woven, 86" x 105"	$5.50
Blankets	2 per bed	Acrilan or other fibers, 72" x 90"	8.00
Couch cover	1 per couch	Cotton woven, washable, 72" x 105"	8.00
Curtains	1 pair per window	Nylon or dacron, tailored, 40" x 81" per pair	3.20
Curtain, shower	1	Vinyl, 72" x 72"	3.00
Dishcloth	2	Cotton, 12" x 14"	.30
Pillow	1 per person	Feather	3.75
Pillowcases	2 per pillow	Muslin, 22" x 42"	.65
Sheets, double	3 per bed	Muslin, 81" x 108"	2.75
single	3 per bed	Muslin, 63" x 108"	2.00
Sheeting, rubber	2 yards for bed	36" wide ($1.70 per yard)	3.40
Tablecloth, cotton	1	54" x 72"	3.35
plastic	1	54" x 72"	3.50
Towels, bath	2 per person	Terry cloth, plain, 22" x 44"	1.00
hand	2 per person	Terry cloth, plain, 16" x 30"	.70
kitchen	1 per person	Cotton, 16" x 30"	.35
Washcloth	2 per person	Terry cloth, 12" x 12"	.40
Special Bedding			
Bedboard, double	1	Only when requested by clinic or physician	11.45
Bedboard, single	1	Only when requested by clinic or physician	7.45
Mattress cover for allergic person	1 per mattress	Only when requested by clinic or physician	3.00
Pillow, foam rubber	1 per person	Only when requested by clinic or physician	4.00
Pillowcase for allergic person	1 per pillow	Only when requested by clinic or physician	.50

5% Sales and Use Tax to be Added

Revised January, 1968

Price Guide Bulletin No. 9, Westchester County Dept. of Social Service (1967) (Appended to Plaintiffs' Memorandum of Law).

WESTCHESTER COUNTY DEPARTMENT OF PUBLIC WELFARE

DIVISION OF FAMILY AND CHILD WELFARE

PRICE GUIDE BULLETIN No. 9

1967

APPROVAL OF HOME ECONOMIST IS NECESSARY FOR ITEMS IN EXCESS OF THIS GUIDE.

CONSULT HOME ECONOMIST FOR HELP WITH OUT-SIZE CLOTHING AND OTHER PROBLEMS RELATED TO CONSUMER INFORMATION AND MONEY-MANAGEMENT.

CONTENTS

PAGE 1 — Infant Layette & During First Year

PAGE 2 — Pre-school Children—Under 2 years and 2-5 Years

PAGE 3 — Girls—6 thru 11 Years & 12 thru 15 Years

PAGE 4 — Misses 16-20 Years and Women

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Price Guide Bulletin No. 9, Westchester County Dept. of Social Service (1967) (Appended to Plaintiffs' Memorandum of Law).

PRE-SCHOOL CHILDREN

	Years Under 2	*Years 2-5*
OUTERWEAR	DRESS SIZES	
	1-3	3-6X
Snowsuit & Hat or Cap	9.70	11.00
Sweater, Orlon	2.98	2.98
Dress, Cotton (girls)	2.98	2.98
Shirt & Slacks Set (boys)	2.98	2.98
Overalls, Corduroy	1.99	1.99
Polo Shirt — Cotton Jersey	1.10	1.10
Light Jacket	2.98	3.98
Play Shorts	1.50	1.00
Swim Suit	1.99	2.98
UNDERWEAR & NIGHTWEAR		
Cotton Slip	1.25	1.98
Panties, Cotton Knit	.59 training	.59
T-Shirt, Cotton Knit	.59	.59
Pajamas, Flannelette	1.98	1.98
Pajamas, Summer weight	1.98	1.98
Bathrobe, washable	3.00	3.98
Socks	.35	.35
FOOTWEAR		
	(Size 2-8)	(Size 8½-12)
Shoes	4.99	5.59
Bedroom Slippers	1.99	1.99
Rubbers	1.99	1.99
Galoshes	3.98	4.00

Price Guide Bulletin No. 9, Westchester County Dept. of Social Service (1967) (Appended to Plaintiffs' Memorandum of Law).

	Girls	
	Years 6—11	Years 12—15
	Dress Size	
	Subteens 7—14	Teens 10—16
Outerwear		
Hat	1.98	2.50
Coat, wool, lined	17.00	20.00
Rain Coat	3.99 plastic	3.99 plastic
Spring Coat or All-Weather Coat	12.95	17.95
Ski Pants	5.38	5.95
Sweater, orlon, cardigan	3.99	3.99
Dress, washable—"dressy"	5.95	6.99
Jumper, washable	3.99	4.99
Blouse	1.98	2.97
Skirt, wool blend, washable	3.99	4.99
Gym Suit	3.50	3.50
Dungarees	2.30	3.99
Cotton Jersey	1.79	1.99
Play Shorts	1.98	2.98
Swim Suit	3.98	6.00
Underwear & Nightwear		
Bathrobe	3.99	4.99
Slip, cotton	1.99	1.99
Garter belt	1.00	1.00
Girdle—2-way stretch	—	3.98
Brassiere, bandeau type	—	1.39
Under shirt	.59	—
Panties, cotton knit	.59	.59
Pajamas, flannelette	1.99	2.85
Pajamas, summerweight	1.99	2.10
Socks	.39	.69
Stockings	—	.79
	Sizes—	
Footwear	(2½—4)	(4½—9)
Shoes	5.99	6.25
Sneakers—(low cut)	3.00	3.00
Bedroom slippers	1.99	1.99
Rubbers	1.99	2.67
Galoshes or Boots	3.99	4.12
Shoe repairs — heels	1.00	1.00
— stitching	.30	.30

Price Guide Bulletin No. 9, Westchester County Dept. of Social Service (1967) (Appended to Plaintiffs' Memorandum of Law).

	Misses & Women Years 16—20 Dress Size 10—20	Adults 32—42
Outerwear		
Hat	3.95	3.95
Coat, Winter wool	22.99	35.00
Coat, Spring	17.95	23.45
Rain Coat, Plastic	3.99	6.64
Sweater, orlon	5.99	5.99
Dress—cotton	5.98	6.98
Dress—"dressy"	8.95	12.98
Suit—Winterweight	19.95	25.00
Suit—Lightweight	6.98	6.97
Shirt	5.99	6.98
Blouse	2.98	3.98
Cotton Jersey	1.98	—
Slacks or Dungarees	3.99	—
Bathrobe	5.99	5.80
Play shorts	2.98	3.98
Swim Suit	8.00	—
Gym Suit	3.50	—
Underwear & Nightwear		
Slip	2.99	2.99
Girdle—pull-on	3.99	3.98
Corset—good support	8.98	12.00
Brassiere, bandeau	1.98	2.00
Brassiere, good support	3.00	3.99
Panties	.59	.69
Vest	.69	.69
Union Suit	1.79	1.79
Nightgown	2.98	3.98
Bathrobe	5.99	5.75
Anklets Socks	.69	—
Stockings	.79	.84
Footwear		
Shoes	7.99	7.99
Bedroom Slippers	1.99	1.99
Rubbers	2.54	2.68
Galoshes	4.00	4.00
Sneakers	3.00	3.00
Shoe Repairs—Half Soles & Heels	2.75	2.75
—Heels	.75	.75
—Stitching	.45	.45

Price Guide Bulletin No. 9, Westchester County Dept. of Social Service (1967) (Appended to Plaintiffs' Memorandum of Law).

	Boys	
	Years 6—11 Junior Sizes 8—10	Years 12—15 Cadets Sizes 12—20
Outerwear		
Cap	1.98	1.98
Hat	—	5.95
Jacket—heavy, winterweight	13.99	16.47
Jacket—light	3.98	5.98
Top Coat, cotton twill, water repellent	10.98	14.98
Rain Coat	3.48	3.99
Sweater	6.94	7.90
Suit—woolen, two piece	19.98	25.00
Sport Coat—wool or blend	—	16.00
Slacks, corduroy	4.98	3.99
wool or blend	4.98	6.97
summer weight	3.49	3.94
Dungarees	2.69	3.98
Ski pants	6.97	—
Shirt	1.99	3.20
Cotton Jersey	1.99	2.90
Play Shorts	1.98	2.99
Swim Suit	1.98	2.75
Gym Suit	4.74	4.74
Underwear & Nightwear		
Shorts	.69	.69
Shirts	.69	.69
Pajamas	2.98	2.98
Bathrobe	3.99	4.77
Socks	.39	.59
Footwear	(Sizes 2½-6)	(Sizes 6-12)
Shoes	8.80	9.90
Sneakers	3.99	4.77
Bedroom slippers	1.99	2.99
Rubbers	2.54	2.69
Galoshes—(Arctic)	4.79	4.97
Shoe repairs—Half soles & heels	3.50	3.50
—Heels	1.25	1.25
—Stitching	.45	.45

Price Guide Bulletin No. 9, Westchester County Dept. of Social Service (1967) (Appended to Plaintiffs' Memorandum of Law).

BOYS & MEN

	YEARS 16—20	ADULTS
	SUIT SIZES	
	STUDENTS	ADULTS 36–46
OUTERWEAR		
Cap	1.98	1.98
Hat	5.96	7.97
Jacket—(Suburban—wool)	16.50	20.00
Rain Coat—all-weather	19.50 zip-out lining	26.95 zip-out lining
Rain Coat—plastic	3.99	5.95
Sweater	7.90	7.99
Suit woolen, two-piece	39.95	45.00
Slacks, lightweight	4.25	5.15
Slacks, winterweight	6.97	8.88
Trousers, work	3.95	5.98
Dungarees	2.98	3.50
Overall Jacket	4.95	4.95
Light Jacket	6.98	8.98
Shirt	2.99	2.98
Cotton Jersey	2.90	—
Play Shorts	2.99	—
Swim Suit	2.99	—
Gym Suit	4.75	—
UNDERWEAR & NIGHTWEAR		
Union Suit	2.78	2.78
Under Shorts	.89	.89
Under Shirt	.89	.89
Pajamas—winterweight	3.98	3.98
summer weight	2.98	2.98
Socks	.59	.69
Bathrobe	5.87	5.99
FOOTWEAR		
Shoes	9.90	9.90
Sneakers	3.99	3.99
Bedroom Slippers	2.99	3.99
Rubbers	3.00	2.99
Galoshes—(Arctic)	4.99	5.95
Shoe Repairs—Half Soles & Heels	3.50	3.50
—Heels	1.25	1.25
—Stitching	.50	.50

Price Guide Bulletin No. 9, Westchester County Dept. of Social Service (1967) (Appended to Plaintiffs' Memorandum of Law).

Home Furnishings

1967

Living and Dining Rooms

Table Lamps—Complete	$ 10.00
Lounge—30 to 39"—Sleeps one	$ 50.00
30" Cot with Mattress and Springs	$ 40.00
39" Cot with Mattress and Springs	$ 40.00
Chair with padded back and seat	$ 15.00
Small chest of Drawers for Lamp	$ 17.00
Aluminum Table—Sturdy—Folding with Drop Leaves—seats up to twelve	$ 20.00
Kitchen Table 24 x 36" with 8 inch Drop Leaves	$ 20.00
Chairs for Dining	$ 10.00
Floor Lamp—complete	$ 15.00
Upholstered chair	$40.00

Bedding—All Mattresses minimum Thickness 4 inches

Steel Bed Frames 39" to 54" with Legs	$ 10.00
Steel Bed Frame 39" with Flat Band Bed Springs on Steel Legs	$ 25.00
Link—Box—or Coil Springs Twin or Double	$ 30.00
Cotton, Polyurethane or interspring Mattresses—Twin	$ 20.00
Cotton, Polyurethane or interspring—Double	$ 30.00
Bed Set—Mattress, Frame and Springs—Twin	$ 70.00
Bed Set—Mattress, Frame and Springs—Double	$100.00

Bunk, Trundle or Duplex Beds—All Mattresses minimum thickness four inches

Complete Double Bunk Bed Sets—39 inch with Ladder and Guard Rail	$100.00
Complete Bunk Bed Sets—39" with Ladder and Guard Rail	$125.00
Duplex Bed Sets 30" x 75" 2 steel link springs 2 coil Mattresses	$100.00

Price Guide Bulletin No. 9, Westchester County Dept. of Social Service (1967) (Appended to Plaintiffs' Memorandum of Law).

Trundle Bed Sets 39″ x 75″ Link Springs with Bed Stead, 2 Interspring—Mattresses	$125.00
Bunk Bed Mattress with Padded Wood Frame Base	$ 50.00
Link Type Bunk Bed Springs 39″ x 75″	$ 12.00
Bunk Bed Mattress 39″	$ 20.00
Sofabed (will sleep two).....	$130.00
Single lounge or sofa (will sleep one)	$115.00

Fold-A-Bed

39″ Tubular Bed—Single Interspring Mattress—Link Springs	$ 40.00

Nursery Equipment

Baby Beds—Standard 53 x 30½ x 41½ inches high Toe-Touch Release, Double Drop Sides —3 Position Steel Link Springs, Plastic Casters	$ 35.00
Mattress-Interspring or Polyurethane—minimum thickness 4 inches	$ 20.00
Bumper Vinyl Cover-Box Edge Top Pillow—Edge Bottom Elastic Ties and Metal Snaps	$ 7.00
Complete Baby Bed Set—Bed and Springs, Mattress and Bumper	$ 62.00
Play Pen—Nylon mesh sides, hardboard floor, rims covered supported by Vinyl, braced legs with plastic tips 42 x 27 x 29″ high	$ 20.00
Pad for Play Pen—Polyurethane ½ inch pad Vinyl Covering	$ 4.00
Training Chair—Seat	$ 5.00
Baby Seat	$ 3.00
High Chair	$ 20.00
Stroller—chrome plated frame 8 inch spoke wheels	$ 20.00
Two-Seater Stroller—Sleeper for Twins with 2 wheel brake	$ 40.00

Price Guide Bulletin No. 9, Westchester County Dept. of Social Service (1967) (Appended to Plaintiffs' Memorandum of Law).

Carriage connects to stroller—11 inch spoke wheels $ 40.00

CLOTHING STORAGE

Chest of Drawers—
4 Drawer—29 x 16 x 37" ..... $ 25.00
5 Drawer—29 x 16 x 43" ..... $ 30.00
6 Drawer Dresser— 45 x 16 x 39½" ..... $ 40.00
Wardrobe 24 Gauge Steel Cabinets
20 x 63 inch high—30 inches wide ..... $ 30.00
20 x 63 inch high—36 inches wide ..... $ 34.00
20 x 63 inch high—42 inches wide ..... $ 38.00

Wall Mirror ..... $ 10.00

ALARM CLOCK ..... $ 4.00

FLOOR COVERINGS

Vinyl print on reinforced felt backing then covered with a layer of clear non-porous Vinyl—(needs no pasting to floor—flexible back grips the floor).
Width— 4½ feet—(per running foot) ..... $ .79
Width— 7½ feet—(per running foot) ..... $ 1.14
Width— 9 feet—(per running foot) ..... $ 1.27
Width—10½ feet—(per running foot) ..... $ 1.59
Width—12 feet—(per running foot) ..... $ 1.72

Vinyl Froor Rug—
9 x 12 feet ..... $ 16.00
12 x 12 feet ..... $ 21.00
12 x 15 feet ..... $ 26.00

Window Shades

6 Gauge—washable vinyl Linen-like texture (6 foot length)
15" through 37½ inch width ..... $ 2.35
37⅜ inch through 43¼ inch width ..... $ 2.95
43⅜ inch through 49¼ inch width ..... $ 3.75
49⅜ inch through 54¼ inch width ..... $ 4.85

Price Guide Bulletin No. 9, Westchester County Dept. of Social Service (1967) (Appended to Plaintiffs' Memorandum of Law).

Curtain Rods

Heavy duty steel rods for tailored or priscilla curtain all hardware included in price—Extension type rod.

18 to 28 inches	$ .49
30 to 52 inches	$ .69
52 to 90 inches	$ 1.00
66 to 120 inches	$ 2.97

Screens

Ventilater Screens—Metal louver backed with 18 x 12″ mesh, galvanized steel screens, metal rails and wooden ends.

7″ high—22 to 37 inches wide	$ 1.15
10¼″ high—22 to 37 inches wide	$ 1.40
10¼″ high—26 to 45 inches wide	$ 1.70

Adjustable Screens—Galvanized—18 x 14 mesh wire, wooden ends, metal rails

Height 9½ inches—20 to 33 inches wide	$ .85
Height 17½ inches—20 to 33 inches wide	$ 1.35
Height 17½ inches—26 to 45 inches wide	$ 1.75

Kitchen

Utility Table—20″ x 4″ with 8 inch Drop Leaf, Strong Steel Legs, High Pressure Plastic Top, Chrome Plating ..... $ 20.00

Utility Cabinets

40 inch wide Base Steel Cabinet 36″ High 20″ Deep ..... $ 50.00

24 inch width Base Steel Cabinet 36″ High, Chrome-Plated Edging ..... $ 35.00
2 Drawers and 2 Cabinet Doors—Chrome Plated Handle Pulls—Brushed Aluminum Legs

40 inch width Wall Steel Cabinet 30″ high 12″ Deep ..... $ 30.00

24 inch width Wall Steel Cabinet 30″ high 12″ Deep 2 Doors—2 Shelves ..... $ 20.00

Kitchen Chairs

Step Stool—Tubular Steel Frame ..... $ 10.00

Utility Serving Cart Table—All Steel Construction on wheels ..... $ 10.00

Price Guide Bulletin No. 9, Westchester County Dept. of Social Service (1967) (Appended to Plaintiffs' Memorandum of Law):

Electric Equipment and Appliances—All J.L. Listed		
Electric Refrigerator—Refrigerator Space 6 to 12 cu. ft. with freezer space 1 to 3 cu. ft. manual defrost		$175.00
if used less than 10 years	$ 75.00	100.00
Electric Refrigerator compact size—2 cu. ft.		100.00
Electric Iron Steam/Dry		10.00
Electric—1 Burner—1000 watts		5.00
2 Burner—650 and 1000 watts		10.00
2 Burner—Sperotic heat control		25.00
Electric Toaster Automatic—1000 watts		9.00
Electric Vacuum Cleaner and attachments—1 horse-power cannister		50.00
Electric Vacuum Cleaner with 1½ horse-power and power-driven brush upright with attachments (allergy to dust)		100.00
Electric—non-automatic Wringer-type washer with pump and base connections—2 speeds		150.00
If used less than 10 years		75.00
Electric Clock		4.00
Gas Cooking—Approved seal of American Gas Association		
20 inch range with oven		110.00
if used not more than 10 years		50.00
30 inch range with oven		125.00
if used not more than 10 years		75.00
Laundry Equipment		
Washing Machine—See Electrical Equipment		
Iron—See Electrical Equipment		
All Steel Laundry Cabinets (single or double) with cover, gives work space, has double drain system, with covered connections		60.00
Aluminum Single Laundry Tubs—21 gals. on wheels with cover		15.00
Double Laundry Tubs (aluminum)— gals. on wheels with cover		25.00
Hand Wringer—Clamp-on		16.00

Price Guide Bulletin No. 9, Westchester County Dept. of Social Service (1967) (Appended to Plaintiffs' Memorandum of Law).

Indoor Drying Rack—fits into bath tubs—30 ft. drying space	5.00
55 ft. drying space—folds for storage	6.00
Outdoor Drying Rack—Disappearing clothes line on reels 150 ft. of drying space enough wash for a family of six, lines are plastic coated steel	20.00
Ground Standard Outdoor Drying Rack—242 ft. holds six washer loads	25.00
Ironing Board—Tubular steel legs and top, self-leveling foot adjuster for uneven floors, table height, adjustable with locks—23 to 36 inch, legs are off center for sit-down ironing	7.50
Ironing Board Cover Pads—Triple-layer, fits 54 inch table top ironing board, Silicone-treated cotton cover, ventilated center layer, bottom layer non-slip material	2.00

Price Guide Bulletin No. 9, Westchester County Dept. of Social Service (1967) (Appended to Plaintiffs' Memorandum of Law).

SPACE HEATERS

It is important to instruct recipients to make use of licensed plumber.

Gas Vented Heaters—A.G.A. Approved safety pilot and thermostat controlled, for natural, mixed or bottled gas, with built in blower.

One-Two Rooms—30,000 B.T.U. Heater	$ 85.00
Three-Four Rooms 55,000 B.T.U.	$125.00
Five-Six Rooms 70,000 B.T.U.	$145.00

Oil Vented Heaters

Steel Cabinets, with heat economizer, automatic draft control uses 6 inch vent pipe and has adjustable leg levels, with built-in blower and thermostat.

One-Two Rooms 49,000 B.T.U. Heater	$ 60.00
Three-Six Rooms 75,000 B.T.U.	$130.00
Outside Tank Installation Kit	$ 12.00
Stoveboard	$ 6.00
Inside Fuel Tank—5 gal.	$ 10.00
8 gal.	$ 15.00

Electric Portable Space Heaters

110-120 volt Heater 1000-1320-1650 wattage range, fan-forced air thermostat controlled, tipover safety switch, U.L. Approved	$ 40.00
1 Heat—Range 1320 wattage	$ 25.00

Price Guide Bulletin No. 9, Westchester County Dept. of Social Service (1967) (Appended to Plaintiffs' Memorandum of Law).

FOOD SERVICE EQUIPMENT AND SUPPLIES

1967

Cooking Utensils

Tea or Coffee Pot	$ 2.65
Double Boiler with cover (2 qt.)	4.20
Sauce Pan and cover (3 qt.)	2.60
Sauce Pan and cover (2 qt.)	2.20
Sauce Pot and cover (6 qt.)	3.60
Roasting and Baking Pan with cover (approx. size 16 x 11 x 2½")	4.50
Fry Pan with cover 10½ inches	3.75
Fry Pan with cover 6½ inches	2.00
Baking Dish oven-proof glass (2 qt.)	1.00
Loaf Pan 9 x 5 x 2½"	2.20
Cake Pan 13 x 9 x 2"	2.20
Cake Pan 9 x 9 x 1½"	2.80
Pie Pan 9" Pyrex	.50
Custard Cups (Set of 6)	.89
Muffin Tins 6 cups	.59
Muffin Tins 12 cups	.89
Cookie Sheet	2.00
Mixing Bowls (Set of 3)	2.00

Cutlery and Miscellaneous

Paring Knife	.59
Large Knife	1.95
Kitchen Fork	.65
Stirring Spoon—slotted	.35
Turner—slotted type	.45
Strainer 7"	.90
Measuring Cup—Pyrex 8 oz.	.35
Measuring Cup—metal	.50
Measuring Spoons (Set of 4)	.60
Rolling Pin	.79
Egg Beater—rotary type	1.10
Potato Masher	.59
Food Grater	.40
Food Grinder/Chopper	7.00
Fruit Reamer—glass	.50
Can Opener—screw type	.50
Knife Sharpener—2 wheel type	.75
Dish Pan	.59
Vegetable Brush	.40
Marketing Cart	5.00

Price Guide Bulletin No. 9, Westchester County Dept. of Social Service (1967) (Appended to Plaintiffs' Memorandum of Law).

FOOD SERVICE EQUIPMENT AND SUPPLIES

1967

Dishes

16 Piece Set— 4 person family	$ 5.25
32 Piece Set— 6 person family	7.85
53 Piece Set— 8 person family	13.00
64 Piece Set—12 person family	15.70

Individual Dishes

Dinner Plate	.25
Small Plate	.15
Soup or Cereal Bowl	.20
Cup and Saucer	.30
Sauce Dish	.15

Extra Dishes

Serving Meat Platter	1.00
Serving Vegetable Dishes	.50
Sugar and Creamer	1.10
Pitcher	1.00
Water Glasses (each) (10 oz.)	.25
Water Glasses (each) (4 oz.)	.20
Salter & Pepper (pair)	.85

Sets of Flatware—Stainless Steel

24 Pieces—Stainless Steel (for 6)	6.25
16 Pieces—Stainless Steel (for 4)	4.00
32 Pieces—Stainless Steel (for 8)	9.00

Individual Flatware—Stainless Steel

Fork	.25
Knife	.80
Teaspoon	.25
Dessert or Tablespoons	.50

Price Guide Bulletin No. 9, Westchester County Dept. of Social Service (1967) (Appended to Plaintiffs' Memorandum of Law).

HOUSEHOLD EQUIPMENT AND SUPPLIES

1967

Cleaning Equipment

Carpet Sweeper—Bristles securely anchored and keeps clean as it sweeps, moving steel combs—combs dirt into dust pans, 3 level sweeping action, rubber wheels and bumper	$ 10.50
Electric Vacuum Cleaner—See Electrical Equipment	
Dust Mop—with handle, mophead, washable 100% nylon or cotton	3.25
Cellulose Double Sponge Mop (To wring pull down handle grip on mop handle—wood handle)	3.00
Extra head	1.00
Broom—indoor—outdoor (Natural fibers are not harmed by water)	2.00
Wringer type cleaning pail—10 qt.	4.00
Dust Pan—short handle	.50
Scrubbing Brush	.39
Toilet Brush	.39

Garbage and Trash Can

Extra Large Plastic Trash Can retards odor and bacteria	
20 gal.	6.00
26 gal.	7.00
32 gal.	8.00
Swinging door Plastic Can	
50 qts.	3.00

Miscellaneous Furnishings

Towel Rack	.60
Waste Basket	.75
Clock—one day or electric	4.00
Scissors	1.00
Hammer	.35
Gimlet	.25
Screw Driver	.35
Pliers	.50
Hooks	.15 each
Electric Light Bulbs	.39

Price Guide Bulletin No. 9, Westchester County Dept. of Social Service (1967) (Appended to Plaintiffs' Memorandum of Law).

HOUSEHOLD TEXTILE PRICES

SHEETS

Double—Muslin—128—140 thread count—81 x 108	$ 2.10
Twin—Muslin—128—140 thread count—72 x 108	2.00
Single—Muslin—128—140 thread count—63 x 99	1.75
Crib, fitted—full size—52 x 27	1.00
Pillow Cases	
Muslin—36 x 42 inches	.59
Blankets	
Utility Blanket—90% wool and 10% nylon—80 x 90 inches	8.00
100% Acrylic Blanket—(mothproof, mildeproof, machine wash & dry)	
Double—80 x 90 inches	9.00
Twin—66 x 90 inches	7.00
Cot or Single—54 x 80 inches	5.00
Crib	4.00
Heavy Weight Napped Cotton Crib Blanket	3.00
Cotton Bed Spreads—Machine Washable	5.00
Couch and Chair Covers—Cotton and Nylon woven, stretchable—sofa	15.00
machine washable—chair	8.50
Studio Couch Cover	10.00
Bolster Cover	5.00
Mattress Covers—Elasticized Vinyl Covers—6 gauge	
Single	2.00
Double	4.00
Crib	2.00
Mattress Pads—Quilted Cotton Fitted	
Double—54 x 75 inches	5.00
Single—39 x 75 inches	4.00
Crib—30 x 54 x 42¼—full size	2.00
Pillows, Feather or Foam—20 x 26 inches	3.00

Price Guide Bulletin No. 9, Westchester County Dept. of Social Service (1967) (Appended to Plaintiffs' Memorandum of Law).

Bed Board—30 x 60 inches	each	$ 7.00
—30 x 60 inches—set of 2		12.00
Rubber Sheeting—36 x 54 inches		1.45
Towels and Other Linens		
Towels		
Bath—cotton terry, plain—22 x 44		.99
Hand—cotton terry, plain—15 x 27		.59
Wash Clothes—cotton terry, plain—12 x 12		.39
Dish Towels—16 x 30		.35
Dish Cloths—cotton, open mesh—13 x 16 inches		.25
Table Cloths—		
54 x 72		2.98
54 x 54		2.00
Curtains—Tailored, Nylon, or Dacron panel price per pair—40 x 81"	pair	5.20
Draperies—Unljned—Fiberglass—washable 48 x 84"	pair	6.98

Affidavit of Joseph S. Barbaro Attached to Plaintiffs' Memorandum of Law in Support of Motion for Leave to Intervene.

JOSEPH S. BARBARO, being duly sworn, deposes and says:

That Deponent is the Commissioner of the Nassau County Department of Social Services and submits this affidavit in reference to the effect of § 131-a of the Social Services Law, as amended and modified by 18 N.Y.C.R.R. § 352.4, upon Families with Dependent Children.

That Deponent holds a degree of Master of Science in Social Service from Fordham University and has been the Commissioner in Nassau County for more than four years.

That your Deponent has had close contact with the administration of public assistance programs in Nassau County and generally throughout the State of New York, as specifically set forth in my affidavit herein dated June 19, 1969. I have had close contact with all categories of needy persons, including needy families with dependent children.

Under § 131-a and the schedules promulgated thereunder, the monthly basic allowances for AABD and ADC families living in any particular area are computed according to identical schedules; these schedules provide significantly higher allowances for a family with chidren in New York City than for a family with the same number of persons in Nassau County and the differential persists at an average of $4.00 to $5.00 per person regardless of the size of the family.

That like the AABD recipients, the ADC families have suffered the loss of all special grants including special diets and telephone allowances. In some respects the impact of the legislation is even more severe on families with children who depended so heavily on the special clothing grants, particularly to adequately clothe their children for school, because their children outgrow and outwear clothes at a rapid rate. The elimination of school

lunch allowances created an additional pressure on ADC budgets without being accounted for in the new flat grant. These plus the differential between counties with identical costs of living have a very severe impact on children whose opportunity in life depends substantially on being adequately fed and clothed now.

It should also be noted that the AABD families have both (1) had restored statewide, a special allowance of $8.00 for single persons and $5.00 for persons living with families, effective October 1, 1969, and (2) had the inequality vis-a-vis New York City and suburban counties corrected. ADC families have been left unchanged.

That, as pointed out in my original affidavit, based on my personal and professional experience, the cost of living in Nassau County is identical or higher than that in New York City and this is certainly as true for residents in the ADC categories as it is for other residents: The proof submitted by me in this case as to the cost of living applies with equal force to *all* categories of recipients, including ADC. This is why in June, 1969, I, and the Board of Supervisors of Nassau County requested the State Commissioner to raise all categories, including ADC, to the level of New York City.

(Sworn to by Joseph S. Barbaro, October 9, 1969.)

SUPREME COURT, U. S.

FILED

NOV 28 1969

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 896

GEORGE K. WYMAN, as Commissioner of the Department of Social Services of the State of New York, and the DEPARTMENT OF SOCIAL SERVICES OF THE STATE OF NEW YORK,

Defendants-Appellants,

against

EDNA ROTHSTEIN, SYLVIA MILLER, HENRIETTA BATSON, CATHERINE JONES and DOLORES HARVANEK, as individuals and on behalf of all other persons similarly situated,

Plaintiffs-Appellees.

JURISDICTIONAL STATEMENT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. .....

GEORGE K. WYMAN, as Commissioner of the Department of Social Services of the State of New York, and the DEPARTMENT OF SOCIAL SERVICES OF THE STATE OF NEW YORK,

Defendants-Appellants,

against

EDNA ROTHSTEIN, SYLVIA MILLER, HENRIETTA BATSON, CATHERINE JONES and DOLORES HARVANEK, as individuals and on behalf of all other persons similarly situated,

Plaintiffs-Appellees.

JURISDICTIONAL STATEMENT

Defendants, the Commissioner and the Department of Social Services of the State of New York, appeal from orders of a three-judge Court (28 U.S.C. § 2281) of the United States District Court, Southern District of New York (HAYS, C.J., MANSFIELD, D.J. and MOTLEY, D.J.), entered September 12 and October 22, 1969, preliminarily enjoining them from enforcing New York Social Services Law § 131-a insofar as that statute provides for differential monthly welfare allowances as between welfare recipients within the City of New York and those in the remainder of the State. The first order (26a-27a)* applied

* Numbers in parentheses refer to pages in the Appendix to this Statement.

only to recipients of aid to the aged, blind and disabled. The second (28a-29a) permitted intervention by recipients of aid to families with dependent children (herein "AFDC") and applied the preliminary injunction to them as well.

By stipulation dated October 24, 1969 all parties have consented to the consolidation of these appeals.

Opinions Below

The opinion of the District Court (MOTLEY, J.) granting the plaintiffs' motion to convene a three-judge Court, and the opinion of the three-judge District Court granting the preliminary injunction, are not yet reported. Both are set forth herein at pages 1a-25a. No opinion was entered in support of the order granting intervention to plaintiffs Jones and Harvanek.

Jurisdiction

The order granting the preliminary injunction was entered September 12, 1969 and defendants' notice of appeal was served and filed October 10, 1969. The order granting the application of plaintiffs Jones and Harvanek for leave to intervene on behalf of their class of AFDC recipients and extending the preliminary injunction to their class, was entered October 22, 1969 and defendants' notice of appeal therefrom was served and filed October 24, 1969. Jurisdiction to review these orders is conferred by 28 U.S.C. § 1253.

Statute Involved

New York Social Services Law § 131-a in pertinent part provides:

> "1. Any inconsistent provision of this chapter or other law notwithstanding, social services officials

shall provide home relief, veteran assistance, old age assistance, assistance to the blind, aid to the disabled and aid to dependent children, to eligible needy persons who constitute or are members of a family household, in monthly or semi-monthly allowances or grants in accordance with standards established by the regulations of the department, but not in excess of the schedules included in this section, less any available income or resources which are not required to be disregarded by other provisions of this chapter. Such schedules shall be deemed to make adequate provision for all items of need in accordance with the provisions of section one hundred thirty-one, exclusive of shelter and fuel for heating, for which two items additional provision shall be made by the social services districts in acordance with the regulations of the department.

2. The following schedule of maximum monthly grants and allowances shall be applicable to the social services district of the city of New York:

Number of Persons in Household

One	Two	Three	Four	Five	Six	Seven
$70	$116	$162	$208	$254	$297	$340

For each additional eligible needy person in the household there shall be an additional allowance of forty-three dollars monthly.

3. The following schedule of maximum monthly grants and allowances shall be applicable to all other social services districts:

Number of Persons in Household

One	Two	Three	Four	Five	Six	Seven
$60	$101	$142	$183	$224	$257	$290

For each additional eligible needy person in the household there shall be an additional allowance of thirty-three dollars monthly.

4. Provided it accords with federal requirements, the regulations of the department shall provide that the commissioner, with respect to any social services district to which subdivision three applies, may promulgate a schedule of monthly grants and allowances for greater or lesser amounts than established by the regulations of the department applicable to such district, but not to exceed the maximums prescribed by subdivision two, for all items of need exclusive of shelter and fuel for heating, if it is established that in such district the total cost of the items included in the schedule applicable to such district actually is more or less, as the case may be, than the cost thereof reflected in such schedule. A social services official may, with the approval of the appropriate local legislative body, make application to the department for the promulgation of a schedule pursuant to this subdivision."

Questions Presented

1. Is New York Social Services Law § 131-a, providing monthly allowances for welfare recipients (exclusive of rent and fuel for heating) at schedules slightly higher for recipients residing in the City of New York, violative of the equal protection clause?

2. Is the issue of the validity of § 131-a under the equal protection clause ripe for federal judicial determination where an aggrieved welfare recipient has an expeditious remedy available in the State to compel the Commissioner of Social Services to increase the allowances for each county, and where the Department of Health, Education and Welfare has not yet passed administratively on the conformity of the statute to the Social Security Act?

Statement of the Case

Under New York law payment to welfare recipients is disbursed in monthly allowances to provide for mainte-

nance at New York's standard of need for all such recipients. Social Services Law §§ 131, 131-a. These allowances are the same regardless of the category of aid given the recipient. The amounts paid do not reflect rent or fuel for heating, which are separately paid to each recipient. Allowance levels were, prior to July 1, 1969, computed administratively by the Commissioner of Social Services. The State was divided into three zones for welfare-allowance purposes and allowances varied slightly between these zones, as follows (statistics for family of four as of 1968, excluding rent and fuel):

SA-1	SA-2	SA-3
(New York City, Dutchess, Greene, Monroe, Nassau, Suffolk, Ulster and Westchester Counties)	(All counties not in SA-1 or SA-3)	(Allegany, Cattaraugus, Chautauqua, Erie, Genesee, Niagara, Steuben and Wyoming Counties)
$152-221	$149-218	$146-215

These $3-per person differences hinged on local variations in the average cost of utilities. The variation within each region depended on the age of the oldest child in each family.

In 1969 the Legislature enacted Social Services Law § 131-a, which established statutory allowances and abolished differentials based on the age of the oldest child. These allowances, which became effective July 1st, provided for $208 per month for a family of four in the City of New York (again exclusive of rent and fuel) and $183 in the remainder of the State.

Since rents, as a result of rent control within the City and greater availability of accommodations, are on the average substantially lower for welfare recipients in the City than for those in suburban areas, the actual amounts received by suburban recipients were frequently as much as, or greater than, those within the City. For example, the average rent for a welfare family of four in New York

City in 1968 was $83.90. In Nassau County the lowest maximum allowable rent for even one person on welfare is $100, and for four persons is $155.*

Such geographical differentials in welfare payments are not unusual. In California, for example, counties are authorized to pay amounts over the state allowance, and these amounts vary from $5.35 per person per month in San Francisco County to $.13 in Fresno County. Los Angeles County pays $2.40 per month, while neighboring Orange County pays $1.02. Calif. Welfare & Insts. Code §§ 11450-52; see "Equal Protection Aspects of Inequalities in Public Education and Public Assistance Programs," 15 UCLA Law Rev. 787, 812-815 (1968).

The chief reason for the differential between allowances (exclusive of rent) to New York City recipients and those outside the City was the legislative finding of a higher social cost of living in the metropolitan center, resulting from the higher level of aspiration and heightened expectations within the City of New York, and most significantly the availability of, and need for, more recreational facilities (parks, zoos, beaches, and the like) especially for children, than in a non-city environment in which children are far more apt to have an available vacant lot or field in which to play. (See Affidavit of V. Murphy [Doc. 12], pp. 3-5):

> "The Department's experience has shown that New York City welfare recipients' actual expenses substantially exceed those of recipients in the remainder of the State. This is due to their higher level of aspiration, greater expectations, the effects of living in a great metropolitan center, and the availability of and need for more recreational facilities than in a suburban or rural environment where children have more

* The proof here showed that plaintiff Rothstein receives $103.25 for rent and plaintiff Batson $106.52 (Murphy Aff. pp. 11-12).

space in which to play. New York City life, realistically, in the experience of the Department, includes transportation to beaches, museums, and parks. It includes a higher crime rate which requires safety locks, greater loss of money and material from burglaries, as well as higher laundry and housecleaning expenses due to soot, air pollution and the like.

In fact, the monthly average payments per recipient vary substantially as between New York City and the suburban counties. The average payment on the Aid to Families with Dependent Children (AFDC) program—by far the largest component of welfare in this State—is $72.28 in New York City and $69.32 in the suburban counties. The variation under the Medical Assistance program is sharper—$123.57 in New York City, $91.55 in the suburban counties. The figures for the remainder of the State are substantially lower than those in the suburban counties. It is to be noted that the levels of welfare in New York State, both prior to the adoption of § 131-a and in that statute, are identical for all programs of welfare—AFDC, Aid to the Blind, Aid to the Disabled and the like.

Moreover, the Legislature was plainly entitled to consider the sheer number of welfare recipients in New York City—889,000 out of 1,211,000 in the State (1968 monthly average). The City warrants special consideration and the Legislature was simply recognizing that fact. In New York City per capita welfare expenditures per total population amounted in 1968 to $66.12; the statewide average is $39.12 and Nassau County only $13.83. Not one of the fifty-seven counties outside New York City was above the statewide average figure."

On May 2, 1969 the Legislature amended § 131-a(4) so as to authorize appellant Commissioner of Social Services to "promulgate a schedule of monthly grants and allowances for greater or lesser amounts than established," but

not to exceed the level provided for recipients in the City of New York, "if it is established that in such district the total cost of the items included in the schedule applicable to such district actually is more or less, as the case may be, than the cost thereof reflected in such schedule." The amendment expressly authorizes a county social services official to apply for such increase in allowances.

Soon thereafter, on June 5, 1969, the Commissioner, acting pursuant to the amended § 131-a(4), promulgated a regulation (18 NYCRR § 352.4) which revised the schedule of allowances for the counties outside the City of New York which had formerly been within the SA-1 zone,* and increased the monthly allowance from $60 to $65 for an individual recipient and from $183 to $191 for a family of four. (The comparable figures within the City of New York are $70 to $208.)** This administrative action sharply reduced the existing differential between the allowances paid within and outside the City of New York.

Prior to the commencement of this action, the claim here asserted was alleged in *Rosado* v. *Wyman* (presently before this Court, No. 540, argued Nov. 19, 1969), and was the issue which required the convening of a three-judge Court. After hearing argument, that Court dissolved itself by order dated May 12, 1969 on the ground that the amendment to § 131-a(4) mooted the issue (——F. Supp. —— [E.D.N.Y. 1969]):

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* Dutchess, Greene, Monroe, Nassau, Suffolk, Ulster and Westchester Counties. These counties are presently designated "SA-2" (18 NYCRR § 352.4).

** The following table shows the monthly allowances for the various parts of the State of New York before and after the advent of § 131-a.

Before July 1, 1969:

SA-1 (New York City, Dutchess, Greene, Monroe, Nassau, Suffolk, Ulster and Westchester Counties)

1	*2*	*3*	*4*	*5*	*6*	*7*	*8*	*9*	*10*
$66	$94-110	$125-156	$152-198	$180-238	$204-274	$234-354	$262-395	$293-437	$320-464

SA-2 (All counties not in SA-1 or SA-3)

1	*2*	*3*	*4*	*5*	*6*	*7*	*8*	*9*	*10*
$63	$91-107	$122-153	$149-194	$176-234	$200-270	$230-350	$259-391	$289-433	$317-460

SA-3 (Allegany, Cattaraugus, Chautauqua, Erie, Genesee, Niagara, Steuben and Wyoming Counties)

1	*2*	*3*	*4*	*5*	*6*	*7*	*8*	*9*	*10*
$60	$88-105	$119-150	$146-192	$173-231	$197-267	$226-346	$255-387	$284-429	$312-456

July 1, 1969 and after:

SA-1 (New York City)

1	*2*	*3*	*4*	*5*	*6*	*7*	
$70	$116	$162	$208	$254	$297	$340	plus $43 for each additional person

SA-2 (Dutchess, Greene, Monroe, Nassau, Suffolk, Ulster and Westchester Counties)

1	*2*	*3*	*4*	*5*	*6*	*7*	
$65	$107	$149	$191	$233	$270	$307	plus $37 for each additional person

SA-3 (All counties not in SA-, 2 or 4)

1	*2*	*3*	*4*	*5*	*6*	*7*	
$62	$104	$146	$188	$230	$267	$304	plus $37 for each additional person

SA-4 (Allegany, Cattaraugus, Chautauqua, Erie, Genesee, Niagara, Steuben and Wyoming Counties)

1	*2*	*3*	*4*	*5*	*6*	*7*	*8*	*9*	*10*
$59	$101	$143	$185	$227	$264	$301	plus $37 for each additional person		

By bulletin dated Sept. 25, 1969, allowances of AABD recipients, state-wide, were increased $8 per month for persons living alone and $5 for persons living with families, pursuant to a demonstration project.

"Pursuant to this new subdivision 4, the Commissioner of Social Services of the State of New York may —either on his own motion or after an application by a local Social Services Officer with the consent of the local legislative body or upon the petition of an aggrieved party, pursuant to Article 78 of the New York Civil Practice Law and Rules—provide schedules for monthly payments in all parts of the state which reflect differences in cost of living.

Under the circumstances it is apparent that the constitutional issue posed is no longer justiciable. The constitutional attack on the provision as originally adopted has been rendered moot and any attack on the newly adopted subdivision would not be ripe for adjudication by this Court until there has been an opportunity for action by state officials and until the matter comes before this Court in an appropriate proceeding."

The dissolution of the three-judge Court in *Rosado* was affirmed by the Court of Appeals, Second Circuit, on July 16, 1969, —— F. 2d ——. The majority opinion by Judge HAYS held that any determination by the three-judge court "would have been premature" and that "[t]he Court was right in refusing to act on facts that were fluid and subject to early change." It noted that it was "confirmed in this view by the fact that, since the dissolution of the three-judge court, the schedule of payments for Nassau County has in fact been increased by reason of the provisions of the amendment to Section 131-a. If corroboration of the opinion of the three-judge court be needed it is provided by this development."

While *Rosado* was on appeal to the Court of Appeals, this action was brought in the District Court, Southern District of New York, for judgment declaring that § 131-a was unconstitutional as a denial of equal protection as a result of the differential in allowances, and violative of 42

U.S.C. § 302(a)(1), which requires a State plan to "be in effect in all political subdivisions of the state," and of the regulation of the United States Department of Health, Education and Welfare (herein "HEW") (45 CFR § 233.20[a]) which provides that state welfare programs "[s]pecify a Statewide standard" and "[p]rovide that the standard will be uniformly applied throughout the State" (Complt. pp. 10, 11). The plaintiffs, recipients of aid to the aged, blind and disabled, also sought an injunction against enforcement of the statute, only "on the ground that said grants and schedules are in violation of and inconsonant with the requirements of the federal Social Security Act and regulations * * *" (Complt. p. 13). The complaint sought no permanent injunction on the constitutional claim.

Nonetheless, the plaintiffs moved before MOTLEY, J. for a three-judge court and a preliminary injunction on both the constitutional and statutory grounds. Appellants opposed both, on the merits and on the ground that the dissolution of the three-judge court in *Rosado* was dispositive here. Appellants were afforded no opportunity to offer evidentiary material or even a brief on the propriety of the application to convene the three-judge court.

On July 7, 1969 the District Court (MOTLEY, J.) granted the plaintiffs' application to convene the three-judge court (24a) and argument was had before that Court (HAYS, C.J., MANSFIELD, D.J. and MOTLEY, J.) almost immediately thereafter.

That Court issued a preliminary injunction against implementation of § 131-a "other than according to objective, non-discriminatory standards based upon the cost of the needs of [welfare] recipients" (26a). The decision underlying the injunction relied heavily on the oral deposition of appellant Commissioner Wyman in which he "stated that he did not know why the Legislature differentiated between New York City and surrounding counties and that it was not done on his recommendation" (6a). This statement in

fact sheds no light whatever on the basis for the action of the Legislature and utterly fails to rebut the powerful presumption that the Legislature had a rational basis for the statute. Section 131-a was not proposed or drafted by appellants and the statement of Commissioner Wyman simply provides no evidence at all of legislative intent.

The Court discarded the powerful showing of legislative purpose shown in the affidavit of appellants, and, although formally acknowledging that "wisdom dictates that in the interest of maintaining a proper balance between state and federal authorities the Equal Protection Clause should not be used to interfere with the state legislative process" (10a), nevertheless carved out a totally unprecedented exception to this rule in the case of welfare legislation. It went on to conclude that § 131-a was violative of the equal protection clause "even when judged by the traditional, rather than the more stringent standard" (13a), preliminarily enjoining appellants, as Commissioner and Department of Social Services, from enforcing the statute "other than according to objective, non-discriminatory standards based upon the cost of the needs of such recipients" (20a). It denied appellants' motion for summary judgment and directed a trial (*id.*), which was adjourned pending disposition of this appeal (Doc. 18).

Thereafter plaintiffs Jones and Harvanek applied, by order to show cause dated October 6, 1969, to intervene on behalf of AFDC recipients outside the City of New York (Doc. 19). The Court granted such intervention and, by order dated October 22, 1969, extended the preliminary injunction to them (Doc. 26). An application by appellants to stay the enforcement of these injunctions, which will, unless stayed, result in enormous expenditures by the federal, state and county governments, was denied by the Court on October 27, 1969. Since the moneys required to be spent in pursuance of these injunctions are effectively irretrievable once disbursed, appellants have applied to this Court for a stay pending disposition of this appeal.

ARGUMENT

This appeal raises substantial issues requiring disposition by this Court.

1. The slight differential in allowance provided for welfare recipients residing in the City of New York is based on the higher social cost of living in a large metropolitan center where recreational facilities are typically distant and needs for laundry, locks and other components greater. This provision has a rational basis and does not deprive plaintiffs of equal protection of the laws.

The Court below improperly reversed the presumption of validity of the State statute—a presumption consistently expressed by this Court in the strongest terms (see *Ferguson* v. *Skrupa,* 372 U. S. 726 [1963])—and thrust the burden of proving its validity upon appellants, the State officials charged with its administration. In issuing the sweeping preliminary injunction, the Court completely undermined the holding of this Court in *McDonald* v. *Board of Election Commissioners,* 394 U. S. 802, 809 (1969) that "Legislatures are presumed to have acted constitutionally even if source materials normally resorted to for ascertaining their grounds for action are otherwise silent, and their statutory classifications will be set aside only if no grounds can be conceived to justify them."

Statutory distinctions between the City of New York and the remainder of the State are common to New York law and have been repeatedly upheld as against claimed denials of equal protection in a variety of contexts. See, e.g., *Matter of Hogan* v. *Rosenberg,* 24 N. Y. 2d 207, 216-218 (1969), app. dism. *sub nom. Puryear* v. *New York,* October 13, 1969 (No. 336, Misc.) (upholding statute permitting jury trial for misdemeanor prosecutions except in New York City); *Spatt* v. *City of New York,* 14 A. D. 2d 30 (2d Dept. 1961) (sustaining New York City compen-

sating-use tax, which taxed property purchased by City residents outside New York City at higher rates than property purchased within the City). Long ago this Court recognized the unique status of New York City and the particular validity of laws relating to it alone. See *Missouri* v. *Lewis*, 101 U. S. 20, 31 (1879), cited with approval in *Salsburg* v. *Maryland*, 346 U. S. 545, 551 n. 6 (1954):

> "There is nothing in the Constitution to prevent any State from adopting any system of laws or judicature it sees fit for all or part of its territory. If the State of New York, for example, should see fit to adopt the civil law and its method of procedure for New York City and the surrounding counties, and the common law and its method of procedure for the rest of the State, there is nothing in the Constitution of the United States to prevent its doing so. This would not, of itself within the meaning of the Fourteenth Amendment, be a denial to any person of the equal protection of the law."

The applicable rule in determinating whether State enactments run afoul of the equal protection clause is whether there exists any rational basis for the classification. Only where the grounds employed by the State are "wholly irrelevant to the achievement of the State's objective" may the statute be struck down. *McGowan* v. *Maryland*, 366 U. S. 420, 425 (1961); *McDonald* v. *Board of Election Commissioners, supra.*

Here there was *uncontroverted* proof in the record as to the precise purpose of the differential provided by § 131-a. Appellant Commissioner Wyman expressly testified (Deposition [Doc. 27], p. 36):

> "The essential difference is in the complexities of urban living in the City of New York, the necessity for provision of transportation items on a regular basis, the fact that there are cultural opportunities, readily

> available transportation, community center facilities, and clinic facilities in New York City that are not available in other areas of the state to the same extent, certainly not the components of the urban living requirements."

The affidavit submitted by appellants (see pp. 6-7, *supra*) bolstered this showing that a rational basis for the $5 per month differential existed. This evidence was never contradicted by plaintiffs and is the only evidence of legislative intent in this record. It provided more than an ample basis for the statutory distinction here attacked.

The Court below, incredibly, sloughed off this proof as no more than an "assumption" which "we find ourselves unable to accept" (15a). It impermissibly substituted its own opinion for that of the Legislature. See *Ferguson* v. *Skrupa, supra,* 372 U. S. at 728-730; *Snell* v. *Wyman,* 281 F. Supp. 853, 862, 863 (S.D.N.Y. 1968), aff'd 393 U. S. 323:

> "Plaintiffs' complaints might move us to vote for changes if we sat as state legislators. But they do not approach the showing of irrationality or arbitrariness warranting exercise of the limited veto power of the federal judiciary under the Fourteenth Amendment.
>
> Against plaintiffs' views, as defendants point out there are arguments of policy which can scarcely be dismissed as frivolous, whether or not we would find them convincing if the judgment of policy were for us. * * *
>
> It is appropriate from time to time to appreciate the full measure and continued vitality of what Mr. Justice Holmes meant when he said: 'The 14th Amendment does not enact Mr. Herbert Spencer's Social Statics.' Lochner v. State of New York, 198 U. S. 45, 75, 25 S. Ct. 539, 546, 49 L. Ed. 937 (1905) (dissenting). Now that his dissenting thought has won

> the day, we ought not to trivialize the achievement by viewing it only as the interment of Spencer's social doctrines. The principle applies to the social philosophers that most of us, including judges, find more persuasive than Spencer. If we were free to enforce what we may modestly deem our more enlightened view, we might seriously consider the changes plaintiffs propose. But we have no such power, and it is better in the end for everyone that this is so. * * *
>
> The principle counsels that it is not for federal judges to be 'liberal' or 'conservative' in advancing and ordering measures which undoubtedly relate to basic matters of human decency and welfare. The constricted test in this forum is one of minimal rationality."

Judge MANSFIELD's opinion, in denigrating and in effect disregarding the *only* evidence of legislative intent in the record, suggested that the aged, blind and disabled were unable, "in view of their physical handicaps, to make any appreciable use of many of the facilities described by the *defendant*" *(15a). This statement, superficially irrefutable, egregiously ignores the fact that in New York the welfare allowances are uniform for all recipients, of whom the overwhelming preponderance are AFDC recipients.* The standards on which the differential was based are plainly applicable to AFDC recipients, who by definition are children and their unemployed parents. The assertion that the State Legislature's reasons for providing a slight additional allowance in the case of children residing in the City of New York must be ignored because the plaintiffs were recipients of adult assistance (15a)—pointless in any

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* New York State has 886,860 recipients of AFDC out of a total of 1,210,601 welfare recipients (1968 figures). In the City of New York there are 657,089 AFDC recipients out of 889,262. As we have noted (fn. p. 9, *supra*), under a recent demonstration project, effective September 25, 1969, AABD recipients are receiving increments of $8 per month, state-wide, if living alone, and $5 if living with a family.

event since the Legislature had the right to base its differential on a reason applicable to the greatest number of recipients (where all classes of welfare recipients receive the same allowance)—was completely dissipated by the intervention of AFDC recipients as parties plaintiff and the extension of the preliminary injunction to their class (28a-29a).

The Court likewise disregarded the fact (Murphy Aff. p. 3) that the New York City Department of Social Services, in applying for permission to establish a 1968 program in which special grants to welfare recipients were replaced by a cyclical grant of $100 per year, stated that "the nature of the urban crisis and the higher social cost of living in the metropolitan center requires a differential assistance level in these areas." This application was approved by appellants and by HEW, and was reflected in the differential in § 131-a.

It is ironic that the Court below cast its attack on the statute in terms of objecting to the use of AFDC criteria in providing a differential to all City of New York recipients (of whom AFDC recipients constitute 75%). Not all states pay identical allowances to AFDC and adult recipients. And in states which pay less to AFDC families that disparity has been attacked as a denial of equal protection. See *Jefferson* v. *Hackney*, —— F. Supp. —— (N. D. Tex., July 1969, Civ. 3-3012B); *Lampton* v. *Bonin*, 299 F. Supp. 336 (E. D. La. 1969).

What the Court below demanded of New York was just that "mathematical nicety" which this Court has declared not to be required by the equal protection clause. *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U. S. 61, 78-79 (1911). As the Court held in *Jefferson* v. *Hackney*, "There remain priorities in time and functions in alleviating human misery. Unless the Court mandates that all human needs be met, we must accept classifications and piecemeal solutions which are not egalitarian between all programs and all human beings." See also *Williamson* v. *Lee Optical of Okla., Inc.*, 348 U. S. 483, 489 (1955).

The *Jefferson* decision rejected the very conclusion on which the Court below so heavily relied—that the subject-matter of this statute automatically rendered inapplicable the rule that legislative distinctions be sustained unless patently irrational, and placed the burden on the State to demonstrate some "compelling interests" in the differential. As the Court in *Jefferson* ruled, the considerations which thrust that burden on the states in the cases cited by the plaintiffs there (and by the plaintiffs and the three-judge Court here) are inapplicable to a statute establishing welfare allowance levels. No impairment of the right to travel is involved, as in *Shapiro* v. *Thompson* (394 U. S. 618 [1969]), or on the right to vote, as in *Harper* v. *Virginia Board of Elections* (383 U. S. 663 [1965]). There is no analogous constitutionally protected right to any particular level of welfare benefits, or indeed to welfare at all. Nor could there be, in view of current proposals by numerous enlightened commentators to dismantle the entire welfare structure and replace it with some completely new program, such as guaranteed income. Thus the disposition below, which shifted the burden of showing legislative intent from the attackers to the defenders of the statute, was plainly improper.

In *Jefferson*, the Court went on to hold that statutes providing for welfare allowances "must be determined by traditional equal protection standards," citing *McDonald* v. *Board of Election Commissioners, supra,* in which this Court rejected a parallel argument that the "compelling state interest" standard be applied to a statute denying absentee ballots to persons jailed awaiting trial. In *McDonald,* as here, the distinctions were not "drawn on the basis of wealth or race, * * * two factors which would independently render a classification highly suspect and thereby demand a more exacting judicial scrutiny." 394 U. S. at 807. After holding, as we have seen, that "Legislatures are presumed to have acted constitutionally even if source materials normally resorted to for ascertaining their grounds for action are otherwise silent" (*id.* at 809),

this Court ruled (*id.* 809):

> "With this much discretion, a legislature traditionally has been allowed to take reform 'one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind,' Williamson v. Lee Optical of Oklahoma, Inc., 348 U. S. 483, 489, 99 L. Ed. 563, 573, 75 S. Ct. 461 (1955); and a legislature need not run the risk of losing an entire remedial scheme simply because it failed, through inadvertence or otherwise, to cover every evil that might conceivably have been attacked. See Ozan Lumber Co. v. Union County National Bank, 207 U. S. 251, 52 L. Ed. 195, 28 S. Ct. 89 (1907)."

Under the applicable test—whether "no grounds can be conceived to justify" the differential (*McDonald, supra* at p. 809), plaintiffs' assertions collapse. No doubt reasonable minds might differ as to the existence, or extent, of the greater social cost of residing in the City of New York.* But once that be conceded—as it must—judicial inquiry is foreclosed. *Ferguson* v. *Skrupa, supra* (372 U. S. at 730):

> "We have returned to the original constitutional proposition that courts do not substitute their social and economic beliefs for the judgment of legislative

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* It is noteworthy that the actual average payments per recipient even prior to the enactment of § 131-a were, because of a much greater frequency of special grants, substantially higher within New York City:

Programs	*New York City*	*Suburban Counties*	*Urban Upstate Counties*	*Remainder of State*
AFDC	$72.28	$69.32	$50.51	$39.07
AFDC-Unemployed Fathers	$72.89	$57.68	$42.30	$34.92
Medical Assistance	$123.57	$91.55	$69.65	$57.48
Home Relief	$43.68	$39.53	$27.54	$20.11

bodies, who are elected to pass laws. As this Court stated in an unanimous opinion in 1941,* 'We are not concerned . . . with the wisdom, need or appropriateness of the legislation.' Legislative bodies have broad scope to experiment with economic problems and this Court does not sit to 'subject the State to an intolerable supervision hostile to the basic principles of our Government and wholly beyond the protection which the general clause of the Fourteenth Amendment was intended to secure.' "

In fact what the Court below did here was precisely what this Court condemned in *Ferguson* and *McDonald.* It violated the tenet of Mr. Justice HOLMES' dissent in *Tyson & Bro.—United Theatre Ticket Offices,* v. *Banton,* 273 U. S. 418, 445-446 (1927), by failing "to recognize that a state legislature can do whatever it sees fit to do unless it is restrained by some express prohibition in the Constitution of the United States or of the State, and that the Courts should be careful not to extend such prohibitions beyond their obvious meaning by reading into them conceptions of public policy that the particular Court may happen to entertain."

Implicit in plaintiffs' argument is an insistence that the Court required every welfare recipient to receive the same allowance. But this is a grotesquely unreal supposition. The allowances paid to recipients in the same category by the various states fluctuate enormously, far beyond whatever variations in the cost of living may exist. AFDC recipients in New York receive an average of $278 per month for a family of four; in Mississippi, $55. Among Northeastern states, where the cost of living is essentially the same, the average monthly allowance to an AFDC recipient varies from $71.75 in New York to $52.00 in Connecticut, $47.80 in Rhode Island, $38.55 in Pennsyl-

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* *Olsen* v. *Nebraska,* 313 U. S. 236, 246 (1941).

vania and $32.25 in Delaware. If it be argued that each state is sovereign and free to set its own level, it should be noted that the federal government pays approximately half of these amounts.

Moreover, there is no constitutional requirement that identical grants be made to each locality within a given state. See *McInnis* v. *Shapiro*, 293 F. Supp. 327, 336 (N. D. Ill. 1968), aff'd *sub nom. McInnis* v. *Ogilvie*, 394 U. S. 322, rejecting a claim of denial of equal protection resulting from variations in aid-per-pupil to school districts ("Nor does the Court establish the rigid guideline of equal dollar expenditures for each student."). Geographical distinctions are not "inherently suspect" as are those, for example, based on race or wealth. And the States' reasonable classifications in this area are not subject to constitutional challenge. *Detroit Edison Co.* v. *East China Tp. School Dist. No. 3*, 247 F. Supp. 296 (E. D. Mich. 1965), aff'd 378 F. 2d 225, cert. den. 389 U. S. 932.

New York legislation has treated the City of New York as *sui generis* in numerous cases. See *Matter of Hogan* v. *Rosenberg, supra; Spatt* v. *City of New York, supra; DiPrima* v. *Wagner*, 14 A. D. 2d 36 (1st Dept. 1961), aff'd 10 N. Y. 2d 728; *Adler* v. *Deegan*, 251 N. Y. 467 (1929). The entire Multiple Dwelling Law of New York is limited in its application to the City of New York. The Court system and large portions of the Code of Criminal Procedure differ markedly as between the City of New York and the remainder of the State. These instances of the pattern of legislative differentiation between the City and the rest of the State are far more pervasive than the one attacked here.

In *South Carolina* v. *Katzenbach*, 383 U. S. 301, 328 (1966), this Court upheld the authority of Congress to deal with the problem of voting discrimination in areas where it was established to be most serious. There, unlike the instant case, the constitutionally-protected right to vote

was involved—yet the classification adopted by Congress was sustained, in the absence of an affirmative showing of irrationality. The plaintiffs have made no such showing here.

Indeed, far from showing the requisite invidious distinction, the plaintiffs failed to show any distinction at all. Plaintiff Rothstein's rent is $103.25 per month for herself alone in Nassau County (Murphy Aff. p. 10)—nearly $20 higher than the average rent for a family of *four* on welfare in the City of New York. Plaintiff Batson similarly receives $108 per month for rent for herself alone in Westchester County (*id.* p. 11). The actual monthly amounts received by these plaintiffs, as a result of these rents substantially in excess of average rents paid to City welfare recipients, are in fact greater than the total received by many comparable City welfare recipients. This alone demonstrates the conjectural nature of the claim of invidious discrimination here, and the impropriety of the injunction. This is bolstered by New York City's higher maintenance and security costs and higher crime rate (Murphy Aff. p. 4).

The only factual evidence offered by the plaintiffs was to the effect that the costs of transportation in Nassau County exceeded that in New York City, but this undeniable fact would be relevant only if the Legislature had not provided a differential for New York City recipients based upon a greater *need* for transportation to recreational and cultural facilities. Since City welfare recipients were determined by the Legislature and by appellant Commissioner to require transportation with far greater frequency, the Legislature clearly had a right to grant an additional stipend for that purpose. And, it is to be noted, the Commissioner, pursuant to the discretion vested in him by § 131-a(4), has already substantially increased the allowances paid to recipients outside New York City, thereby nearly halving the differential. See p. 8, *supra*. Further, plaintiffs are free to apply to appellant Commissioner or to county Social Services authorities for

elimination or further reduction of the differential upon submission of proof supporting such an application. See pp. 8, 10, *infra.*

The claim that, irrespective of the equal-protection issue, § 131-a violates the Social Services Act and HEW Regulations, is untenable. The statute relied upon by plaintiffs (42 U.S.C. § 302[a][1]) requires a State plan to "be in effect in all political subdivisions of the state." Section 131-a obviously complies with this provision. The HEW Regulation relied on by plaintiffs (45 CFR § 233.20[a]) states that programs shall specify a statewide standard and uniformly apply that state standard throughout the state. The plaintiffs and the Court below conceded that this statute and regulation did not necessarily require an identical standard throughout each state (19a), and the lower Court acknowledged that these provisions "would appear to be aimed at the fundamentally sound objective" of protecting recipients "from adoption of different eligibility standards or other criteria for different areas" (18a-19a). The Court below itself deferred determination of this contention "in anticipation of a ruling by H.E.W." (19a) and did not base its injunction on that claim.

This disposition was plainly correct and should have been a basis for denial of the preliminary injunctions. See *Catholic Medical Ctr.* v. *Wyman*, —— F. Supp. —— (E.D.N.Y., 69 Civ. 641, decided Oct. 21, 1969), in which the three-judge Court (FRIENDLY, C.J., MISHLER, D.J. and JUDD, D.J.) deferred determination of the validity of New York's Medicaid provisions, also challenged on both Constitutional and statutory grounds, "until the United States Secretary of [HEW] has an opportunity to express his views." The Court added, citing *Addison* v. *Holly Hill Fruit Products, Inc.*, 322 U. S. 607, 619 (1944), that "[s]ince H.E.W. is not a party to this litigation, it seems proper to defer decision of the motions for a short period in order to hear from the Department. It may be that H.E.W. has

dealt with similar problems in some other state, that it has relevant negotiations under way, or that it will point to some part of the statutory scheme for its participation that we have overlooked."

The preliminary injunction was of necessity based on the conclusion that the plaintiffs had "made a clear showing of probable success" (19a). In the absence of such a showing, the extraordinary broad and drastic injunction granted them, resulting as it does in the disbursement of enormous sums of federal, state and county funds which will be impossible to retrieve, was clearly improper.

2. The issue sought to be litigated here is unripe for federal judicial determination since the statute explicitly provides a remedy in the courts of the state.

The claim on which the preliminary injunction was based, was, as we have shown, on one of the contentions originally raised in *Rosado* v. *Wyman*. The three-judge court in that case dissolved itself since that issue had become moot with the enactment of amended § 131 a(4), which permits appellant Commissioner to increase the allowances of recipients in any county, if he finds such increases warranted by the cost of the items in the standard of need of such recipients. A county Social Services official may apply for such an increase.

In its decision, the three-judge court specifically noted:

> "Pursuant to this new subdivision 4, the Commissioner of Social Services of the State of New York may—either on his own motion or after an application by the local Social Services officer with the consent of the local legislative body or upon the petition of an aggrieved party, pursuant to Article 78 of the New York Civil Practice Law and Rules—provide

schedules for monthly payments in all parts of the States which reflect differences in cost of living."

This order, affirmed by the Court of Appeals and presently on review here, specifically held that an available state remedy existed through the expeditious, summary route of an Article 78 proceeding—the New York codification of the common-law writ of mandamus. That remedy is presently available to the plaintiffs. For this reason alone the issuance of the preliminary injunction here was improper since the Court below should have considered "whether plaintiffs have an adequate, untried remedy under State law." *Schumann* v. *State of New York,* 270 F. Supp. 730, 732 (S.D.N.Y. 1967); *Douglas* v. *City of Jeannette,* 319 U. S. 157, 163 (1943). See also *Fenster* v. *Leary,* 264 F. Supp. 153 (S.D.N.Y. 1966), aff'd 386 U. S. 10.

The Court below acknowledged the existence of this available State remedy but sloughed it off on the ground that it had "no assurance that the issues would be promptly resolved by any of the state court procedures suggested by defendants" (17a). This was implausible since an Article 78 proceeding in the State Courts would provide immediate relief for any aggrieved welfare recipient. While, as the Court held, exhaustion of state court remedies is not a jurisdictional prerequisite, it is an important element to be considered in determining the propriety of broad preliminary relief such as was improvidently granted here. This is particularly so where, as here, § 131-a (4) requires any amendments by the Commissioner to "accord with federal requirements." Thus administrative disposition by HEW would have the force of law. And no delay by HEW has been alleged.

To have saddled the State with the sweeping preliminary injunction such as was imposed here, and then to extend the injunction to a far larger group of recipients in advance of trial, was an abuse of discretion. The Court below

employed the wrong test in determining the validity of the state welfare program, ignored the demonstration of rational legislative purpose provided by appellants, and impermissibly substituted its opinion on policy matters for that of the state Legislature.

CONCLUSION

For the foregoing reasons, this Court should note probable jurisdiction and grant plenary consideration to the instant appeal.

Dated: New York, New York, November 18, 1969.

Respectfully submitted,

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Opinion of Statutory Three-Judge Court.

Before HAYS, Circuit Judge, and MANSFIELD and MOTLEY, District Judges

MANSFIELD, D.J.

Plaintiffs in this class action are aged, blind and disabled welfare recipients residing in Nassau and Westchester Counties, New York. They receive payments under a cooperative federal-New York State assistance program established pursuant to the Social Security Act, 42 U.S.C. §§ 301, *et seq.*, § 1382. The program, which must meet certain federal requirements, is financed jointly by the two governments and administered by the State of New York pursuant to its Social Services Law, §§ 131, *et seq.* and regulations promulgated thereunder by its Department of Social Services. Plaintiffs attack a recent amendment of that law, § 131-a, which has resulted in their receiving lower payments than welfare recipients residing in New York City, as violative of the Equal Protection Clause of the Fourteenth Amendment and of certain provisions of the Social Security Act, as amended, 42 U.S.C. §§ 301, *et seq.*, §§ 1202(a)(1), 1352(a)(1) and 1382(a)(1).[1] By way of relief they seek a declaratory judgment to the effect that the amendment is unlawful, and preliminary and permanent injunctions enjoining any enforcement and implementation of the amendment that would reduce public assistance payments received by them below the level available to residents of New York City. Defendants have cross-moved for summary judgment.

For the reasons stated herein, preliminary injunctive relief is granted and defendants' motion for summary judgment is denied.

At all times here involved New York's Social Services Law, § 131, has imposed upon state, county, city and town social services officials the duty "to provide adequately

for those unable to maintain themselves" and, toward that objective, to assume the responsibility of administering the necessary care, treatment and services to the extent permissible under appropriations made by the State and various local governments forming its subdivisions. Subsection 3 of § 131 provides:

> "3. A principal consideration in determining the adequacy of assistance and care [in each case] shall be the sufficiency thereof for maintenance in accordance with standards of public health in the community with due regard for variations in cost from time to time and between localities, *in accordance with the provisions of section one hundred thirty-one-a of this chapter.*" (Bracketed portion deleted and underlined portion added in March 1969)

Prior to the recent adoption of § 131-a the State Department of Social Services (which has the duty of promulgating regulations and instituting procedures for the administration and distribution of public assistance in New York State, Social Services Law, § 20), acting pursuant to the foregoing provisions, determined the standards of need and the adequacy of allowances to be made for welfare assistance to various categories (including the aged, blind and disabled) by periodic calculations of the cost of component recurring items required to provide a basic subsistence level, including certain items of food, laundry, household supplies, school expenses, utilities, and personal incidentals. The component items were confined, according to defendants, to the "basics of life" and did not include any allowance for transportation to, or use of, recreational or cultural facilities, such as museums, parks or beaches. Following such studies the Department then established administratively a monthly level or standard of need required by a recipient for these items. Other requirements, including rent, fuel for heat, and various

non-recurring, emergency or special needs, were made the subject of separate or special grants and allowances, which are not in issue here except to the extent that they constitute a background leading to the New York Legislature's effort, in adopting § 131-a in 1969, to simplify the cumbersome and complicated structure of welfare grants within the State by making greater use of the so-called "flat grant" system.[2]

In making the calculations forming the basis of the standard of essential needs, the Department did not engage in a county-by-county analysis of the cost of each of the component items, except with respect to utilities, since the variations in cost between counties was not sufficient to warrant any differentiation. For instance, the relevant schedule of costs published by the Bureau of Labor Statistics, U. S. Department of Labor, which was among the publications used by defendant in making its computations, placed New York City and surrounding counties in the same classification. After defendants thus arrived at proposed levels of need annually, they then rebudgeted the case load for the State, taking into consideration the availability of funds at the local level, and recommended revised standards to the State Legislature.

Prior to the recent enactment of § 131-a the last such cost survey made by the State Department of Social Services was in May, 1968, following which the Department, in August 1968, divided the State into three regions known as "SA-1," "SA-2" and "SA-3," for each of which a separate level was established for recipients in that region. The differences between the levels for the three regions were based on variations in utility costs. The region known as SA-1, as thus established by defendants, included New York City and the counties of Duchess, Greene, Monroe, Nassau, Suffolk, Ulster and Westchester (hereinafter sometimes referred to as the "surrounding counties").

The level established for recipients in the SA-1 region varied according to the number of persons in each household and the age of the dependent children in the household. The level for a single person household, for instance, was established at $66 per month and was increased in gradations to a high of $464 for a household of 10 persons, the exact amount depending on the age of the various children in the household. The important fact for purpose of the present application is that as of August, 1968 the Department of Social Services had concluded that the cost of the essential recurring items going into the allowance level for welfare recipients did not vary sufficiently between New York City and its surrounding counties to warrant any differentiation between the standards of needs for such recipents. Title 18, N.Y.C.R.R., § 352.4.[3]

On March 31, 1969 the New York Legislature enacted § 131-a (Laws of 1969, ch. 184), which established two schedules of maximum flat monthly grants of public assistance (exclusive of shelter and fuel for heating) allowable to recipients, one applicable to New York City and the other to all other social services districts in New York State, as follows:

	Number of Persons in Household							Each
	1	2	3	4	5	6	7	Additional
New York City	70	116	162	208	254	297	340	43
Outside New York City	60	101	142	183	224	257	290	33

A differential in favor of New York City recipients was thus approved, subject to change or elimination by defendants' promulgation of a schedule of lesser monthly allowance levels for any social services district upon a showing that the total cost of the items required to be provided in the schedule actually was less than the schedule established by regulations of the Department.

On May 2, 1969, the Legislature amended the recently adopted § 131-a (Laws of 1969, ch. 411) to permit the Commissioner to *raise or lower* the levels of the schedules for all districts except New York City upon a showing that such a revision was warranted by the cost of the items included in such schedules, subject to the condition that the levels of schedules for districts outside of New York City could not exceed the maximums prescribed for New York City. Thus, as finally amended, § 131-a established a maximum level for New York City that could not be reduced by defendants and a lower so-called "maximum" level for all other social services districts that could be reduced or increased (notwithstanding its characterization as "maximum") up to the New York City level.

The Legislature's reason for thus differentiating between New York City and its surrounding counties, and for guaranteeing a maximum level to the welfare recipients in the former while subjecting those in the latter to the possibility of an increase or decrease in assistance at defendants' discretion, is a mystery, particularly in view of the Department's past practice of grouping them in one classification on the basis of data that had not changed prior to the adoption of § 131-a. The "Legislative Findings and Purpose" set forth at the outset of the amendment contain a declaration by the Legislature to the effect that it was necessary to establish schedules "based upon the costs of delivering the needs of public assistance recipients in the respective social services districts of the State." However, the only relevant cost data available to the Legislature was the 1968 cost study that had led the Department of Social Services administratively to establish the schedule of needs for recipients in New York City and surrounding counties at identical levels.

The lack of any rationality for the Legislature's differentiation is deepened by the fact that since the 1968

study no further study of the costs of component items going into the levels has been made. Defendant George K. Wyman, Commissioner of Social Services, testified that his Department did not undertake or furnish any other cost study for the assistance of the Legislature and that as far as he knew the only information furnished by his Department to the Legislature pertaining to such grant levels was that forming the basis of the schedules that had been administratively promulgated by him in 1968. He frankly stated that he did not know why the Legislature differentiated between New York City and surrounding counties, and that it was not done on his recommendation.

The "Legislative Findings and Purpose," as well as other evidence furnished by plaintiffs, indicates that budgetary considerations may have played a role in the adoption of § 131-a. At the outset of the amendment the Legislature referred to "the spiralling rise of public assistance rolls and the expenditures therefor, despite continuous prosperity and high employment." It went on to emphasize that the new schedules would "release caseworkers for the more important task of providing services." Its newly adopted schedules for the most part did not increase the standards of needs for recipients, and in some instances they substantially reduced existing levels. Drastic reductions have been made in allowances for certain special needs not provided for in the basic monthly grants.

On June 5, 1969, pursuant to the authority granted to him by § 131-a, as amended, defendants promulgated schedules increasing the levels of welfare allowances for districts located in surrounding counties to a point where the gap that had been established by the Legislature between them and New York City was partially closed. For instance the allowance for a single adult household was raised from the $60 established by the Legislature to $65, which brought it within $5 of the $70 level fixed by the

Legislature for New York City. Levels for larger households in the surrounding counties were similarly increased to within $4 to $5 per person below the New York City level.[4]

Notwithstanding defendants' earlier decision, based on the only available cost data, that the levels for New York City and surrounding counties should be identical, they now decided that a differential of from $4 to $5 per person could be justified on the ground that New York City recipients were required to spend more money on what was described as the "social cost of living in the urban center" arising out of a "higher level of aspiration," and "greater expectations, the effects of living in a great metropolitan center and the availability of and need for more recreational facilities than in a suburban or rural environment where children have more space in which to play." Such additional expense, according to defendants, would include "transportation to beaches, museums and parks" and "high laundry and housecleaning expenses due to soot, air pollution and the like." Although defendant Wyman testified that he assumed that certain cultural, medical and recreational facilities (such as museums, parks, community and religious centers, clinics, children day care centers, and beaches) are more available in New York City to recipients there than are similar facilities to recipients in surrounding counties, and are used to a greater extent by recipients in New York City, he conceded that his Department had no evidence or study supporting his assumption.

There is no evidence that the factor of "social cost of living," as thus defined, was considered by the Legislature at the time when it enacted § 131-a, and defendant Wyman testified that as far as he knew the Legislature did not have before it any evidence pertaining to the cost or use of such cultural opportunities. On the other hand, plaintiffs have furnished extensive evidence, including detailed analyses

of transportation costs made by the Nassau County Planning Commission, establishing that the cost of transportation to museums, clinics and other types of recreational facilities in Nassau is substantially higher than that in New York City.[5] Although defendant apparently concedes that the Legislature did not establish the differential between New York City and surrounding counties upon the theory now advanced by him, he points out that the New York City Department of Social Services, in connection with a 1968 demonstration project which provided for a flat annual cyclical grant of $100 per year in lieu of *special* grants to recipients for certain types of clothing and household items, stated that "the nature of the urban crisis and the higher social cost of living in the metropolitan center requires a differential assistance level in these areas." However, such *special* grants were for items not embraced by the alowances here under consideration. Furthermore, although defendant Wyman had the foregoing statement available to him in 1968, he nevertheless established identical levels for New York City and its surrounding counties. Thus there is nothing in the record before us at this time to support the theory that the Legislature established a differential based upon a higher "social cost of living" in New York City.

In support of their application for preliminary relief plaintiffs urge that § 131-a and the regulations established by defendants thereunder violates their rights under the Equal Protection Clause of the Fourteenth Amendment for the reason that it creates an irrational, unjustifiable inequality between welfare allowances granted to residents of New York City and those of surrounding counties, with the result that even though the gap has been partially reduced by defendants' administrative action, it is substantial enough to cause irreparable injury to plaintiffs and persons in the same class, who live at a bare subsistence

level and for whom the sum of $5 per month can be crucial in mitigating their hardship and suffering and enabling them to survive. In the alternative, plaintiffs urge that § 131-a violates the provisions of the Social Security Act, 42 U.S.C. §§ 302(a)(1), 1202(a)(1), 1352(a)(1), 1382(a)(1), requiring that standards of need established under a co-operative federal-state assistance program be state-wide and uniform in character.

The Equal Protection Claim

Turning first to the constitutional issue, which forms the basis of this Court's jurisdiction under 28 U.S.C. § 2281, we advert initially to certain fundamental principles by which we are governed in assessing plaintiffs' contention that their rights to equal protection have been violated. At the outset we recognize that since the Equal Protection Clause applies to persons rather than places, "[t]erritorial uniformity is not a constitional requisite," *Salsburg* v. *Maryland,* 346 U. S. 545, 552 (1953), and that generally "there is no rule that counties, as counties, must be treated alike." *Griffin* v. *School Board,* 377 U. S. 218, 230 (1963). With the needs and desires of its various subdivisions in mind, a state has the constitutional power to legislate in a manner which may create inequalities between those residing within different local governmental units, provided the statutory discriminations rest on grounds relevant to the statute's purposes. *Griffin* v. *School Board, supra; McGowan* v. *Maryland,* 366 U. S. 420, 425 (1960); *Salsburg* v. *Maryland, supra.* However, a legislative discrimination which is purely arbitrary and draws invidious, irrational distinctions cannot withstand a Fourteenth Amendment attack. *Gulf, Colorado & Santa Fe Ry.* v. *Ellis,* 165 U. S. 150 (1896).

The line between constitutionally permissible and impermissible legislative inequalities is far from crystal clear. "Notions of what constitutes equal treatment for purposes of the Equal Protection Clause *do* change." *Harper* v. *Virginia Bd. of Elections,* 383 U. S. 663, 669 (1965). Certain broad principles, however, are now well established. When the challenged classifications pertain to the conduct of business transactions, the Supreme Court has freely recognized the difficult problems and interests that state legislatures must balance. In such cases, even though the reason for the statute may be unstated and difficult to discern from surrounding circumstances, the presumption in favor of validity is favored, *Brown* v. *Maryland,* 25 U. S. (12 Wheat) 419, 436 (1827), and we are guided by the principle that "[a] statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it." *McGowan* v. *Maryland,* 366 U. S. 420, 426 (1960) (state Sunday closing laws). Absent an invidious distinction, or one affecting a fundamental or critical personal right, wisdom dictates that in the interest of maintaining a proper balance between state and federal authorities the Equal Protection Clause should not be used to interfere with the state legislative process. The need or appropriateness of legislation is to be determined by the legislature, not the courts, and the latter should not substitute their economic or social beliefs for those of the former. *Ferguson* v. *Skrupa,* 372 U. S. 726 (1962). We do not "sit as a superlegislature." *Salsburg* v. *Maryland,* 346 U. S. 545, 550 (1953). Traditionally such business and economic legislation, even though it might create inequalities, has withstood attack if it could possibly bear some reasonable relationship to the statutory purpose. *Lindsley* v. *Natural Carbonic Gas Co.,* 220 U. S. 61 (1911) (regulating drilling for natural gas); *Morey* v. *Doud,* 354 U. S. 457, 463, 464 (1957) (regulating use of premises as

"currency exchanges"), *Williamson* v. *Lee Optical Co.*, 348 U. S. 483, 489 (1954) (regulating the sale of eye glasses); *Ft. Smith Light Co.* v. *Paving Dist.*, 274 U. S. 387 (1926) (imposing duty to repair on street railways).

Where legislative classifications create inequalities affecting the exercise of fundamental or critical personal rights, however, a more stringent standard is applied in determining whether such distinctions are prohibited by the Equal Protection Clause. Particularly where they operate to the detriment of a disadvantaged minority, they are "closely scrutinized and carefully confined," *Harper* v. *Virginia Bd. of Elections, supra* at 670. Mere speculation as to a possible rational basis or justification for the distinction is insufficient. "Such a law, even though enacted pursuant to a valid state interest bears a heavy burden of justification, . . . and will be upheld only if it is necessary, and not merely rationally related, to the accomplishment of a permissible state policy." *McLaughlin* v. *Florida*, 379 U. S. 184, 196 (1964) (striking down state law prohibiting interracial marriage). The standard has more recently been described in even stricter terms as one making constitutionality depend upon whether the statute "promotes a *compelling* state interest." *Shapiro* v. *Thompson*, 37 U.S.L.W. 4333, 4339 (1969) (holding unconstitutional residency requirements for welfare payments); see also *Hobson* v. *Hansen*, 269 F. Supp. 401, 506-507 (D. C. 1967) (Wright sitting by designation).

Receipt of welfare benefits may not at the present time constitute the exercise of a constitutional right.[6] But among our Constitution's expressed purposes was the desire to "insure domestic tranquility" and "promote the general Welfare." Implicit in those phrases are certain basic concepts of humanity and decency. One of these, voiced as a goal in recent years by most responsible governmental leaders, both federal and state, is the desire to

insure that indigent, unemployable citizens will at least have the bare minimums required for existence, without which our expressed fundamental constitutional rights and liberties frequently cannot be exercised and therefore become meaningless." Legislation with respect to welfare assistance, therefore, like that dealing with public education, access to public parks or playgrounds, or use of the mails, deals with a critical aspect of the personal lives of our citizens, whether such assistance be labeled a "right," "privilege" or "benefit." See *Sherbert* v. *Verner*, 374 U. S. 398, 404 (1962). Its importance is magnified by the defenseless and disadvantaged state of the class of citizens to which it relates, who are usually less able than others to enforce their rights. It can hardly be doubted that the subsistence level of our indigent and unemployable aged, blind and disabled involves a more crucial aspect of life and liberty than the right to operate a business on Sunday or to extract gas from subsoil. We believe that with the stakes so high in terms of human misery the equal protection standard to be applied should be stricter than that used upon review of commercial legislation and more nearly approximate that applied to laws affecting fundamental constitutional rights. Poverty is a bitter enough brew. It should not be made even less palatable by the addition of unjustifiable inequalities or discriminations. It must not be forgotten that in most cases public assistance represents the last resource of those bereft of any alternative. Equity (the state or quality of being equal, derived from the latin *aequitas*), should least of all be denied the poor."

Applying the foregoing principles to § 131-a of the Social Services Law, we must conclude, on the basis of the record now before us, that the differential between allowance levels established for welfare recipients in New York City and those in surrounding counties constitutes

an arbitrary, invidious and irrational inequality in violation of the Equal Protection Clause, even when judged by the traditional, rather than the more stringent, standard. Turning first to the statute itself, if the Legislature had not gone to the trouble of expressly stating its "Findings and Purpose" more room might exist for speculation as to a possible reasonable basis for the unequal treatment of recipients. But its reasons are expressed, and in some detail. While recognizing certain advantages in a uniform schedule of monthly grants and allowances, the statement fails completely to provide any reason for the uneven treatment of recipients in New York City, on the one hand, and those in surrounding counties, on the other, except to imply that it was the result of budgetary considerations.

There is not a scintilla of evidence that the difference between the level of the schedules prescribed by the Legislature for New York City and for its surrounding counties, respectively, could be justified on the basis of a difference in cost of the essential items forming the basis of those levels. Indeed, the evidence before us is clear and undisputed that the cost of those essential items was the same for New York City as for the seven surrounding counties. In the face of such convincing and uncontroverted evidence we cannot, therefore, assume that the Legislature founded the statutory disparity upon a geographical variation in cost of the component items. Nor would we be warranted in upholding the discrimination as being in furtherance of a legislative desire to reduce welfare costs, an objective recently rejected by the Supreme Court in *Shapiro* v. *Thompson*, *supra*:

> "We recognize that a State has a valid interest in preserving the fiscal integrity of its programs. It may legitimately attempt to limit its expenditures,

> whether for public assistance, public education, or any other program. But a State may not accomplish such a purpose by invidious distinctions between classes of its citizens. It could not, for example, reduce expenditures for education by barring indigent children from its schools. Similarly, in the cases before us, appellants must do more than show that denying welfare benefits to new residents saves money. The saving of welfare costs cannot be a independent ground for an invidious classification." (*Shapiro* v. *Thompson*, 37 U.S.L.W. 4333, 4337 (April 22, 1969))

Thus a reduction in welfare benefits is perinissible under the Equal Protection Clause only if it is not effected through arbitrary inequalities.

Pursuant to the provisions of § 131-a as enacted by the Legislature, defendant Wyman might have promulgated new schedules for the surrounding counties, which would raise their allowance levels to the level prescribed for New York City. In that event the constitutional issue before us might have become moot, a consideration which prompted the three-judge court in *Rosado* v. *Wyman*, —— F. Supp. —— (1969) to dissolve itself and remand that case to Judge Weinstein. However, although Commissioner Wyman has reduced the gap between the levels for New York City and the surrounding counties by promulgation of new schedules, there remains a difference of approximately $4 to $5 per person between the levels of the two schedules. While this may seem minor to most citizens, it is of crucial importance to the recipients here, who present tragic hardship cases, some of them already the victims of severe cutbacks in other forms of special aid formerly received (e.g., telephone service for medicines and groceries; food for seeing-eye dogs; transportation allowances to hospitals; special diets for diabetics; readers for the blind; "homemakers" for those confined to wheelchairs; etc.). To an indigent person now receiving ap-

proximately 90¢ per day for food, an additional 15¢ per day can hardly be described as *de minimis*. Access to such bare necessities of life, on a non-discriminatory basis, involves a critical interest for those whose life depends on it.[10] The issue has not, therefore, been mooted and the constitutional question remains a substantial one.

The bases advanced by defendant for upholding § 131-a, or at least deferring preliminary relief, are wholly lacking in persuasion. The first of these is that the needs of New York City welfare recipients are greater than those of recipients elsewhere because of what is termed "the higher social cost of living." At first blush there might appear to be something to the proposition that the plight of the welfare recipient living in grim and dismal quarters in a New York City ghetto is so miserable and frustrating that he is led to make greater use of parks, beaches, museums, recreational and cultural centers than is the recipient in the City's suburban counties, particularly since these facilities are within easier reach in New York City. The need for such facilities, referred to euphemistically by defendants as arising from "a higher level of aspiration" and "greater expectations," would require funds not only for transportation but also for payment for use of those not furnished free of charge (*e.g.*, admission fees to a semi-public beach).

In the absence of an iota of evidence to support an assumption that welfare recipients encounter such a "higher social cost of living," we find ourselves unable to accept it. We question whether the aged, blind and disabled are able, in view of their physical handicaps, to make any appreciable use of many of the facilities described by the defendant, such as beaches and museums. Furthermore, is it reasonable to assume that welfare recipients living at or below a subsistence level, who are provided for their nutritional needs with less than $1 per day (the buying power of which is diminishing weekly as the cost of living rises sharply), will sacrifice any sub-

stantial part of their meager payments in favor of cultural, recreational and educational benefits? We doubt it. Even if it could be shown that a part of such payments is used for these purposes, defendant erroneously assumes that welfare recipients in the suburban counties live in more pleasant and less frustrating surroundings than those in New York City. The picture of suburban welfare recipients living in garden apartments (the term used on oral argument), located on the edge of a park, is an unreal one. It ignores the existence of many rundown tenements in the slum districts of our surrounding suburban counties, which unfortunately provide the principal housing facilities for welfare recipients. Under such circumstances we cannot accept the proposition that recipients living in similar conditions in New York City need or use recreational or cultural facilities more than do recipients in suburban areas.

In any event, extensive and reliable proof has been offered by plaintiffs to the effect that the cost of transportation to recreational facilities, museums, beaches and hospitals in the surrounding counties, such as Nassau, is substantially greater than that incurred by New York City residents who are located closer to such facilities and have cheaper transportation available to them. For instance, while New York City residents can normally travel quickly to parks, beaches, museums and hospotals for the cost of a subway ride (ten cents each way for the elderly, twenty cents for all others), residents outside of New York City are faced with public transportation provided by a number of private companies at much higher costs (up to $1.70 per trip), requiring numerous transfers and considerably more time and expense. Consequently, defendants' argument that the disparity in levels is justified by New York City residents' increased need for and cost of transportation to such facilities must be rejected on the record before us.

We also find no merit in defendants' further argument that in view of the pendency of a petition by Nassau County for an increase in the allowance levels promulgated for it and the availability to surrounding counties of various other state remedies as a means of seeking an increase in the level of payments available to them, the constitutional issue is not ripe for determination. The situation has changed substantially since the three-judge court in *Rosado* v. *Wyman* dissolved itself on the ground that the issue raising its jurisdiction (essentially the issue now before this Court) might be rendered moot by administrative action. Administrative action now has been taken and it has failed to moot the issue. Any further delay could work substantial and irreparable injury to plaintiffs. We have no assurance that the issues would be promptly resolved by any of the state court procedures suggested by defendants. No reasons exist, therefore, for abstention;[12] and exhaustion of state court remedies is not a prerequisite. *King* v. *Smith*, 392 U. S. 309, 312, fn. 4 (1968); *Damico* v. *California*, 389 U. S. 416 (1969); *McNeese* v. *Board of Education*, 373 U. S. 668 (1963); *Frozen Food Express* v. *United States*, 351 U. S. 40 (1956); *Holmes* v. *New York City Housing Authority*, 398 F. 2d 262 (2d Cir. 1968).

The Claim of Violation of the Social Security Act

In view of our disposition of the constitutional issue, upon which our jurisdiction is grounded, it is unnecessary to dwell at length on plaintiffs' alternate contention that § 131-a violates applicable provisions of the Social Security Act, an issue over which this Court has pendent jurisdiction. *Smith* v. *King*, 277 F. Supp. 31 (1967). Plaintiffs' argument is founded on the proposition that 42 U.S.C. § 302(a)(1) and § 1382(a)(1), and regulations promulgated thereunder by the Department of Health, Education

and Welfare ("H.E.W."), require states participating in federally-financed assistance programs to conduct them on a state-wide basis pursuant to uniform standards. Applying that principle here, plaintiffs contend that, while the application of such uniform standards may lead to different levels of assistance in different areas of a state, § 131-a is fatally defective for the reason that it simply creates disparities arbitrarily and without adoption or application of uniform standards. See *King* v. *Smith*, 392 U. S. 309, 326-327 (1968).

Section 302 deals with state plans for old-age assistance and medical assistance for the aged while § 1382 is concerned with State plans for aid to the aged, blind and disabled, and medical assistance for the aged. Both statutes require in subsection (a)(1) that any such plan

> ". . . provide that it shall be in effect in all political subdivisions of the State, and, if administered by them be mandatory upon them."

Further support for a requirement of state-wide uniform standards is found in regulations recently promulgated by the H.E.W., 34 *Federal Register* No. 19, pp. 1394-1395 (Jan. 29, 1969), and codified as 45 C.F.R. § 233.20, which direct that state plans "[p]rovide that the standard [of assistance] will be uniformly applied throughout the State," 45 C.F.R. § 233.20(2)(iii), and

> "[p]rovide that payment will be based on the determination of that amount of assistance needed and that, if full individual payments are precluded by maximums or insufficient funds, adjudgments will be made by methods applied uniformly statewide. 45 C.F.R. § 233.20(3)(viii)."

On their face the foregoing provisions of the Social Security Act and regulations would appear to be aimed at

the fundamentally sound objective of assuring that persons in like circumstances should be treated equally throughout a state rather than exposed to the type of unfair hodgepodge that could result from adoption of different eligibility standards or other criteria for different areas. Indeed, a quotation cited by plaintiffs from a letter of James Callison, H.E.W. Regional Commissioner for Region II (which includes New York State) to defendants, dated April 16, 1969, indicates this was the H.E.W.'s objective in inquiring whether the differential between levels promulgated under § 131-a for New York City and other areas of the State "may be justified on the basis of differences in the cost of living in local areas." Plaintiffs' non-constitutional argument, however, is based primarily on regulations promulgated by H.E.W. Since the schedules and regulations adopted by defendants are now under review by that agency, which possesses considerable expertise with respect to its own regulations and should be entitled to interpret them in the light of the complexity of problems presented by various welfare programs, see 45 C.F.R. § 233.20(1), we at this stage defer determination as to the requirements of the Social Security Act in anticipation of a ruling by H.E.W.

Preliminary Relief

Having thus made a clear showing of probable success, plaintiffs have also demonstrated that denial of preliminary relief will work a much more severe hardship upon them, amounting to irreparable injury, than any hardship that would result to defendants from the granting of preliminary relief. *Clairol Incorporated* v. *Gillette Company*, 389 F. 2d 264 (2d Cir. 1968); *Unicon Management Corp.* v. *Koppers Company*, 366 F. 2d 199, 204 (2d Cir. 1966); *Dino de Laurentiis Cinematographica, S.p.A.* v. *D-150, Inc.*, 366 F. 2d 373, 375 (2d Cir. 1966). To plaintiffs the difference

between the monthly payments to them and to recipients in New York City represents the bare essentials of life, whereas if defendants should ultimately prevail any such differentials paid in the interim to plaintiffs and others similarly situated would be recoverable or offset against future allowances. Since no issue has been raised, upon this application for preliminary relief, as to the classification of the lawsuit as a class action under Rule 23, F.R.C.P., the action will be treated as such for purposes of temporary relief.

Accordingly, plaintiffs' motion for preliminary relief is granted to the extent that pending trial and final determination of the action defendants will be restrained from further enforcement or implementation of § 131-a of the New York Social Services Law, or from promulgating schedules of grants and allowances of public assistance, or making payments thereof to recipients, other than according to objective, non-discriminatory standards based upon the cost of the needs of such recipients. Trial of the action will commence on October 6, 1969 at 10:00 A.M. Defendants' motion for summary judgment is denied.

The foregoing constitutes the Court's findings of facts and conclusions of law pursuant to Rule 52(a), F.R.C.P.

Submit order on notice in accordance with Rule 65(d), F.R.C.P.

Dated: August 4, 1969.

PAUL R. HAYS
Paul R. Hays,
U. S. Circuit Judge

WALTER R. MANSFIELD
Walter R. Mansfield,
U. S. District Judge

CONSTANCE BAKER MOTLEY
Constance Baker Motley,
U. S. District Judge

FOOTNOTES

[1] "A state plan . . . must . . . provide that it shall be in effect in all political subdivisions of the State, and, if administered by them, be mandatory upon them." 42 U.S.C. § 302(a)(i) (Old Age Assistance). Identical requirements are found in § 1202(a)(i) (Aid to the Blind); § 1352(a)(i) (Aid to the Permanently and Totally Disabled); and § 1382(a)(i) (the combined program of Aid to the Aged, Blind or Disabled and Medical Assistance to the Aged). Since New York administers a composite program under § 1382, that statute will be referred to herein as the basis for plaintiffs' claim.

[2] In 1968 the City of New York with H.E.W. approval, established a demonstration project authorizing the elimination of *special* grants for certain clothing and household replacements and the payment, in lieu thereof, of the sum of $100 per year to each repicient. This experiment in the flat grant approach to public assistance was believed by some to offer certain advantages, including less affront to a recipient's dignity than the special grant method, more opportunity for the recipient to budget, reduction of administrative costs, and freeing caseworkers for counseling duties.

[3] "352.4 *Needs—items of basic maintenance.*

* * * * *

"(2) The pre-added monthly allowance schedule for food, clothing, personal incidentals, household supplies, school expenses, utilities, laundry for AABD, expenses incident to AABD, including sales taxes related thereto, shall be as follows:" (Codes Rules and Regs. of State of N. Y. Title 18, § 352.4)

There follows a schedule of identical monthly sums for New York City and the Counties of Dutchess, Greene, Monroe, Nassau, Suffolk, Ulster and Westchester.

[4] Plaintiffs have introduced extensive evidence supporting the conclusion that New York City and surrounding counties should be treated iidentically. The United States Department of Labor's Bureau of Labor Statistics prepares and presents costs of living material for the New York metropolitan area without drawing any distinction in living costs between New York City and the surrounding counties, whereas distinctions are drawn between such metropolitan area and the rest of the state. See, e.g., *Three Standards of Living for an Urban Family of Four Persons*, U. S. Dept. of Labor, 1969, p. 16; *Standard Metropolitan Statistical Areas*, U. S. Bureau of the Budget, 1967.

Footnotes.

A comparison of cost figures published by New York City, Westchester and Nassau for major items forming components of the grant levels under consideration reveals that the cost of most basic items of food and clothing are identical, whereas most household furnishings cost more in Westchester and Nassau than in New York City, possibly because of greater competition and more second hand stores in New York City. See *Handbook for Case Units*, New York City Dept. of Social Services, Jan. 1968; *Price Guide Bulletin* #9, Westchester County Dept. of Social Service (1967); *Price Guide—Clothing & Household Furnishings*, Nassau County Dept. of Social Services, Oct. 1, 1968.

[5] See affidavit of John Calbreath Burdis, Planning Director, Nassau County Planning Commission, and exhibits thereto.

[6] Welfare assistance does represent a statutory right, as distinguished from charity. If a person meets the requirements prescribed by statute under a federally assisted program, the agency is obligated to recognize his claim. See Reich, The New Property, 73 Yale L. J. 733, 785-786 (1964); Note, Development in Law, Equal Protection, 82 Harv. L. R. 1065, 1192 (1969).

[7] The concept was expressed by President Roosevelt in his June 8, 1934 message to Congress recommending legislation on economic security:

> "Among our objectives I place the security of the men, women, and children of the Nation first.
>
> "This security for the individual and for the family concerns itself primarily with three factors. People want decent homes to live in; they want to locate them where they can engage in productive work; and they want some safeguard against misfortunes which cannot be wholly eliminated in this man-made world of ours."

The substance of the message has been repeated by every President since that date.

[8] Our constitutional guarantees dictate the abandonment of a philosophy, which has long prevailed in many quarters, that the poor and disabled must be treated as "nonperson allowed to receive charity but not entitled to equal rights."

[9] The surrounding counties would still be discriminated against to the extent that § 131-a, as amended, guarantees New York City recipients the maximum level, whereas those in surrounding counties are forced to establish that the total costs of items included in the schedules applicable to their districts is more than the cost thereof

reflected in such schedules. Since the evidence before us, however, indicates that the costs are identical, the Commissioner would be required to raise the levels of the surrounding counties to that of New York City.

[10] The standards promulgated under the Social Services Law are described by Joseph S. Barbaro, Commissioner of Social Services for Nassau County, who has carefully studied the needs of welfare recipients, as follows:

> "The present standards of assistance provide for life on a level of sustenance, nothing more, and often less. The standards which will go into effect on July 1, 1969 provide for even less." (Aff. of Joseph S. Barbaro, sworn to June 19, 1969)

[11] For example, the United States Department of Labor announced that for the first six months of 1969 the cost of living in the New York City area was increasing at the rate of 6.4% per year, which continued the trend experienced in 1968. New York Times, July 24, 1969, page 1, col. 1.

[12] Unlike the situations in *Harrison* v. *N.A.A.C.P.*, 360 U. S. 167 (1959), and *Fenster* v. *Leary*, 264 F. Supp. 153 (S.D.N.Y. 1966), *aff'd.*, 386 U. S. 10 (1967), the facts here reveal a classic instance of the type of special circumstance calling for exercise of federal jurisdiction. See *Baggett* v. *Bullitt*, 377 U. S. 360 (1964); *Dombrowsky* v. *Pfister*, 380 U. S. 479 (1965); and *Zwickler* v. *Koota*, 389 U. S. 241 (1967).

Decision and Order Convening the Three-Judge Court.

Decision and Order Concerning the Three Judge Court

amendment in connection with the aid program for dependent children. *Rosado v. Wyman*, 322 U.S. 255. The constitutional claims were held not insubstantial by the single District Judge. *Rosado v. Wyman*, F. Supp. (E.D.N.Y., April 24, 1969), and by the three judge court when convened. *Rosado v. Wyman*, F. Supp. (E.D.N.Y., May 12, 1969).

However, the New York Legislature amended the new provisions on May 9, 1969, to allow the Social Services Commissioner and local social services officials to continue benefits in counties outside of New York City up to the New York state level. The three judge court then held the complaint stands moot and not ripe for adjudication by that court until there has been an opportunity for a hearing in state officials and until the matter comes before that court in an appropriate procedure. *Rosado v. Wyman*, supra, at (May 12, 1969).

Plaintiffs now claim that the defendant's continuance has denied the opportunity given him by that three-judge court so that he promulgated a new schedule of grants to plaintiffs' counties. However, it is alleged that this new schedule provides benefits still well below the New York state level without rational justification and that the constitutional questions are now ripe for adjudication.

The court agrees and accordingly, the motion to convene a three judge court is granted and the clerk is directed herewith to the Chief Judge of the Circuit.

Dated: New York, New York, July 7, 1969

[illegible]

[illegible]

[illegible]

U.S.D.J.

Preliminary Injunction Order.

Plaintiffs having moved this Court for a preliminary injunction staying the enforcement of § 131-a of the New York Social Service Law and regulations promulgated thereunder in a manner which discriminates against recipients of Aid to the Aged, Blind, and Disabled in certain counties outside the City of New York, and defendants having moved this Court for summary judgment, and these motions having been considered by this Court:

Upon the pleadings, affidavits, briefs and oral depositions submitted on behalf of the parties, the hearings held to date, and the opinion of this Court dated August 4, 1969, this Court having found in said opinion that the differential established by § 131-a and regulations promulgated thereunder between public assistance grants to recipients of Aid to the Aged, Blind or Disabled residing in New York City and those to residents of the counties of Duchess, Greene, Monroe, Nassau, Suffolk, Ulster and Westchester constitutes an arbitrary, invidious and irrational inequality in violation of the Equal Protection Clause, it is

ORDERED, ADJUDGED AND DECREED THAT

1. Pending further order of this Court or termination of this action, defendants, their agents and employees are restrained from the enforcement or implementation of § 131-a of the New York Social Service Law with respect to recipients of Aid to the Aged, Blind and Disabled, or from promulgating schedules of grants and allowances of public assistance or making payments thereof to such recipients, other than according to objective, non-discriminatory standards based upon the cost of the needs of such recipients;

2. Defendants' motion for summary judgment is denied.

Dated: New York, N. Y., September 12, 1969.

PAUL R. HAYS
Paul R. Hays, U.S.C.J.

WALTER R. MANSFIELD
Walter R. Mansfield, U.S.D.J.

CONSTANCE BAKER MOTLEY
Constance Baker Motley, U.S.D.J.

Order Granting Leave to Intervene and Extending Preliminary Injunction.

Plaintiff-applicants Catherine Jones and Dolores Harvanek, having moved this Court for leave to intervene into the instant action as party plaintiffs on behalf of themselves and on behalf of all other recipients of public assistance in the Aid to Dependent Children category, who are similarly situated, and said plaintiff-applicants having also moved for a Preliminary Injunction staying the enforcement of § 131-a of the New York Social Services Law and regulations promulgated thereunder in a manner which discriminates against recipients in the Aid to Dependent Children category in certain counties outside the City of New York, and these motions having been considered with due deliberation by this Court;

Upon the pleadings, affidavits, brief and oral depositions submitted initially on behalf of the original parties, the hearings held to date between the original parties, and the pleadings, affidavits and briefs submitted on behalf of the plaintiff-applicants herein, and the affidavit submitted in opposition by the defendants, this Court having found in an opinion dated August 4, 1969 that the differential established by § 131-a and regulations promulgated thereunder between public assistance grants to recipients of Aid to the Aged, Blind or Disabled categories residing in New York City and those to residents of the counties of Dutchess, Greene, Monroe, Nassau, Suffolk, Ulster and Westchester constitutes an arbitrary, invidious inequality in violation of the Equal Protection Clause; it appearing to the Court that the said Catherine Jones and Dolores Harvanek should be permitted to intervene as representatives of recipients of Aid to Dependent Children, it is

Order Granting Leave to Intervene and Extending Preliminary Injunction

ORDERED, ADJUDGED AND DECREED that

1. The plaintiff-applicants Catherine Jones and Dolores Harvanek have leave to intervene herein on behalf of themselves and on behalf of all recipients in the Aid to Dependent Children category who are similarly situated, may file instanter their complaint in this cause in the same manner and with like effect as if named as an original party, and are hereby made a party to this cause;

2. The caption of the instant action shall be amended to include the names of the plaintiff-applicants to read:

EDNA ROTHSTEIN, SYLVIA MILLER, HENRIETTA BATSON, CATHERINE JONES and DOLORES HARVANEK, individually and on behalf of all other persons similarly situated,

Plaintiffs,

against

GEORGE K. WYMAN, individually and in his capacity as Commissioner of Social Services for the State of New York, and the DEPARTMENT OF SOCIAL SERVICES for the State of New York,

Defendants.

---

3. Pending further order of this Court or termination of this action, defendants, their agents and employees are restrained from the enforcement or implementation of § 131-a of the New York Social Services Law with respect to recipients of Aid to Dependent Children, or from promulgating schedules of grants and allowances of public assistance or making payments thereof to such recipients.

other than according to objective, non-discriminatory standards based upon the cost of the needs of such recipients.

Dated: New York, New York, October 20, 1969.

PAUL R. HAYS
Paul R. Hays,
U.S.C.J.

WALTER R. MANSFIELD
Walter R. Mansfield,
U.S.D.J.

CONSTANCE BAKER MOTLEY
Constance Baker Motley,
U.S.D.J.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 896

GEORGE K. WYMAN, as Commissioner of the Department of Social Services of the State of New York, and the DEPARTMENT OF SOCIAL SERVICES OF THE STATE OF NEW YORK,

Defendants-Appellants,

against

EDNA ROTHSTEIN, SYLVIA MILLER, HENRIETTA BATSON, CATHERINE JONES and DOLORES HARVANEK, as individuals and on behalf of all other persons similarly situated,

Plaintiffs-Appellees.

BRIEF FOR APPELLANTS

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 896

GEORGE K. WYMAN, as Commissioner of the Department of Social Services of the State of New York, and the DEPARTMENT OF SOCIAL SERVICES OF THE STATE OF NEW YORK,

Defendants-Appellants,

against

EDNA ROTHSTEIN, SYLVIA MILLER, HENRIETTA BATSON, CATHERINE JONES and DOLORES HARVANEK, as individuals and on behalf of all other persons similarly situated,

Plaintiffs-Appellees.

BRIEF FOR APPELLANTS

Defendants, the Commissioner and the Department of Social Services of the State of New York, appeal from two orders of a statutory three-judge Court of the United States District Court, Southern District of New York (HAYS, C. J., MANSFIELD, D. J. and MOTLEY, D. J.), entered September 12 and October 22, 1969 respectively. These orders preliminarily enjoin defendants from enforcing New York Social Services Law § 131-a insofar as that statute provides for a slightly higher monthly welfare allowance to welfare recipients within the City of New York than to those in the

remainder of the State. The first order (A. 125-A. 126)* applied only to recipients of aid to the aged, blind and disabled (herein "AABD"). The second (A. 164-A. 166) permitted intervention by recipients of aid to families with dependent children (herein "AFDC") and applied the preliminary injunction to them as well.

Opinions Below

The opinion of the District Court (MOTLEY, J.) granting plaintiffs' motion to convene a three-judge court dated July 7, 1969 is not reported, but is set forth in the Appendix at A. 35-A. 36.

The opinion of the three-judge District Court granting the preliminary injunction is reported at 303 F. Supp. 339 and is set forth in the Appendix at A. 103-A. 124. No opinion was entered in support of the order granting intervention to plaintiffs Jones and Harvanek.

Jurisdiction

The order granting the preliminary injunction was entered September 12, 1969 and defendants' notice of appeal was served and filed October 10, 1969.

The order granting the application of plaintiffs Jones and Harvanek for leave to intervene on behalf of their class of AFDC recipients, and extending the preliminary injunction to their class, was entered October 22, 1969 and defendants' notice of appeal therefrom was served and filed October 24, 1969.

By stipulation dated October 24, 1969, all parties consented to the consolidation of these appeals.

---

* Numbers in parentheses preceded by "A." refer to pages of the Appendix.

On October 22, 1969, the date of the second order, defendants applied for a stay of the two orders. This application was argued before the statutory three-judge court on October 27, 1969 and the Court denied the stay in open court.

On December 10, 1969 Mr. Justice HARLAN denied appellants' application for a stay pending disposition of the appeal in this Court without prejudice to defendants' application for an accelerated hearing of this appeal.

An application for an accelerated hearing was made on December 17, 1969. That application was never formally ruled on but an accelerated schedule of briefs was agreed upon by the parties in order for this Court to hear argument this term.

Probable jurisdiction was noted on February 24, 1970.

The jurisdiction of this Court rests on 28 U.S.C. § 1253.

Statute Involved

New York Social Services Law § 131-a* in pertinent part provides:

> "1. Any inconsistent provision of this chapter or other law notwithstanding, social services officials shall provide home relief, veteran assistance, old age assistance, assistance to the blind, aid to the disabled and aid to dependent children, to eligible needy persons who constitute or are members of a family household, in monthly or semi-monthly allowances or grants in accordance with standards established by the regulations of the department, but not in excess of the schedules included in this section, less any available

* Section 131-a was enacted on March 31, 1969 to take effect on July 1, 1969 by L. 1969, ch. 184. Subdivision 4 was added to § 131-a by L. 1969, ch. 411, enacted May 2, 1969, effective July 1, 1969.

income or resources which are not required to be disregarded by other provisions of this chapter. Such schedules shall be deemed to make adequate provision for all items of need in accordance with the provisions of section one hundred thirty-one, exclusive of shelter and fuel for heating, for which two items additional provision shall be made by the social services districts in accordance with the regulations of the department.

2. The following schedule of maximum monthly grants and allowances shall be applicable to the social services district of the city of New York:

Number of Persons in Household

One	Two	Three	Four	Five	Six	Seven
$70	$116	$162	$208	$254	$297	$340

For each additional eligible needy person in the household there shall be an additional allowance of forty-three dollars monthly.

3. The following schedule of maximum monthly grants and allowances shall be applicable to all other social services districts:

Number of Persons in Household

One	Two	Three	Four	Five	Six	Seven
$60	$101	$142	$183	$225	$257	$290

For each additional eligible needy person in the household there shall be an additional allowance of thirty-three dollars monthly.

4. Provided it accords with federal requirements, the regulations of the department shall provide that the commissioner, with respect to any social services district to which subdivision three applies, may promulgate a schedule of monthly grants and allowances for greater or lesser amounts than established by the regulations of the department applicable to such dis-

trict, but not to exceed the maximums prescribed by subdivision two, for all items of need exclusive of shelter and fuel for heating, if it is established that in such district the total cost of the items included in the schedule applicable to such district actually is more or less, as the case may be, than the cost thereof reflected in such schedule. A social services official may with the approval of the appropriate local legislative body, make application to the department for the promulgation of a schedule pursuant to this subdivision."

Questions Presented

1. Are the issues of the validity of New York Social Services Law § 131-a under the equal protection clause and its conformity to the Social Security Act ripe for federal judicial determination where an aggrieved welfare recipient has an expeditious remedy available in the State to compel the Commissioner of Social Services to increase the allowances for each county, and where the state courts have never interpreted the new statutory scheme and neither the state courts nor the Department of Health, Education and Welfare have yet passed on the conformity of the statute to the Social Security Act?

2. Does § 131-a, which provides monthly allowances for welfare recipients (exclusive of rent and fuel for heating) at schedules slightly higher for recipients residing in the City of New York, create a legislative classification so arbitrary as to be violative of the equal protection clause?

The Court below answered "yes" to both these questions.

Statement of the Case

Essentially, this case concerns the authority of the New York State Legislature to make slightly higher payments to its almost 900,000 welfare recipients concentrated in New York City than it pays to the 323,000 recipients dispersed throughout the rest of the State.

A. Public Assistance in New York Before 1969.

This litigation was brought in response to new legislation which, for the first time, set the standards of assistance by statute, rather than by administrative provision, and greatly simplified those standards. Payment to welfare recipients is disbursed in monthly allowances to provide for maintenance at the established standard of need for all such recipients. Social Services Law §§ 131, 131-a. These allowances are the same in New York regardless of the category of aid (AFDC, AABD, etc.) given the recipient. The amounts paid are exclusive of rent and fuel for heating, which are separately paid to each recipient. Before the effective date of the new statute, July 1, 1969, the levels of welfare allowances were set by the Commissioner of Social Services pursuant to a broad statutory standard, to wit (Social Services Law § 131):

> "Insofar as funds are available for that purpose, to provide adequately for those unable to maintain themselves.
>
> • • •
>
> A principal consideration in determining the adequacy of assistance and care shall be the sufficiency thereof for maintenance in accordance with standards of public health in the community with due regard for variations in cost from time to time and between localities."

Thus, the Commissioner established items of basic need and levels of payment to cover those items from year to year based on cost-of-living surveys made by his Department and other agencies such as the Bureau of Labor Statistics. The State was divided into three zones for welfare-allowance purposes and allowances varied slightly between these zones. The levels which were established following the August, 1968 survey are as follows (statistics for family of four, excluding rent and fuel):

SA-1 District—$152-221	Includes: New York City, Dutchess, Greene, Monroe, Nassau, Suffolk, Ulster and Westchester Counties
SA-2 District—$149-218	Includes: All counties not in SA-1 or SA-3
SA-3 District—$146-215	Includes: Allegany. Cattaraugus, Chautauqua, Erie, Genesee, Niagara, Steuben and Wyoming Counties

These $3-per person differences hinged on local variations in the average cost of utilities. The variation within each region depended on the age of the oldest child in each family.

B. The 1969 Legislation.

In 1969 the Legislature enacted Social Services Law § 131-a, which established statutory allowances and abolished differentials based on the age of the oldest child. These allowances, which became effective July 1, 1969, provided for $208 per month for a family of four in the City of New York (again exclusive of rent and fuel) and $183 in the remainder of the State. The levels paid to each size family pursuant to § 131-a are based on the amounts paid under the then most recent August, 1968 re-pricing.

On May 2, 1969 the Legislature amended § 131-a (4) so as to authorize the defendant Commissioner of Social Services to "promulgate a schedule of monthly grants and allowances for greater or lesser amounts than established," but not to exceed the level provided for recipients in the City of New York, "if it is established that in such district the total cost of the items included in the schedule applicable to such district actually is more or less, as the case may be, than the cost thereof reflected in such schedule." The amendment expressly authorizes a county social services official to apply for such increase in allowances.

Soon thereafter, on June 5, 1969, the Commissioner, acting pursuant to the amended § 131-a(4), promulgated a regulation (18 NYCRR § 352.4) which revised the schedule of allowances for the counties outside the City of New York which had formerly been within the SA-1 zone*, and increased the monthly allowance from $60 to $65 for an individual recipient and from $183 to $191 for a family of four. (The comparable figures within the City of New York are $70 and $208.)** This administrative action sharply reduced the differential between the allowances which were to be paid within and outside the City of New York effective July 1, 1969.

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* Dutchess, Greene, Monroe, Nassau, Suffolk, Ulster and Westchester Counties. These counties are presently designated "SA-2" (18 NYCRR § 352.4).

** The following table shows the monthly allowances for the various parts of the State of New York before and after the advent of § 131-a.

Before July 1, 1969:

SA-1 (New York City, Dutchess, Greene, Monroe, Nassau, Suffolk, Ulster and Westchester Counties)

1	*2*	*3*	*4*	*5*	*6*	*7*	*8*	*9*	*10*
$66	$94-110	$125-156	$152-198	$180-238	$204-274	$234-354	$262-395	$293-437	$320-464

SA-2 (All counties not in SA-1 or SA-3)

1	*2*	*3*	*4*	*5*	*6*	*7*	*8*	*9*	*10*
$63	$91-107	$122-153	$149-194	$176-234	$200-270	$230-350	$259-391	$289-433	$317-460

SA-3 (Allegany, Cattaraugus, Chautauqua, Erie, Genesee, Niagara, Steuben and Wyoming Counties)

1	*2*	*3*	*4*	*5*	*6*	*7*	*8*	*9*	*10*
$60	$88-105	$119-150	$146-192	$173-231	$197-267	$226-346	$255-387	$284-429	$312-456

July 1, 1969 and after:

SA-1 (New York City)

1	*2*	*3*	*4*	*5*	*6*	*7*	*8*	*9*	*10*
$70	$116	$162	$208	$254	$297	$340	plus $43 for each additional person		

SA-2 (Dutchess, Greene, Monroe, Suffolk, Ulster and Westchester Counties)

1	*2*	*3*	*4*	*5*	*6*	*7*	*8*	*9*	*10*
$65	$107	$149	$191	$233	$270	$307	plus $37 for each additional person		

SA-3 (All counties not in SA-1, 2 or 4)

1	*2*	*3*	*4*	*5*	*6*	*7*	*8*	*9*	*10*
$62	$104	$146	$188	$230	$267	$304	plus $37 for each additional person		

SA-4 (Allegany, Cattaraugus, Chautauqua, Erie, Genesee, Niagara, Steuben and Wyoming Counties)

1	*2*	*3*	*4*	*5*	*6*	*7*	*8*	*9*	*10*
$59	$101	$143	$185	$227	$264	$301	plus $37 for each additional person		

By bulletin dated Sep. 25, 1969, allowances of AABD recipients, state-wide, were increased $8 per month for persons living alone and $5 for persons living with families, pursuant to a demonstration project.

This administrative change restored welfare recipients almost precisely to the level of assistance they were receiving prior to the legislative enactment. Thus, Nassau and Westchester County individual welfare recipients received a basic allowance of $66 before the legislative change and $65 afterwards. For the average family of four in those counties receiving welfare payments the amount received remained precisely the same. Such a family of four (with an eldest child of the mean age of 10.9 years) was receiving $191 prior to the new legislation and the Commissioner's regulation set the allowance at precisely that amount.

C. *Rosado* v. *Wyman* and the Unripeness of This Case.

By order to show cause dated April 9, 1969, *Rosado* v. *Wyman** was instituted in the Eastern District of New York, attacking § 131-a on two grounds. In the first place, it was alleged that § 131-a conflicted with 42 U.S.C. § 602(a)(23), a section of the Social Security Act governing the eligibility of states for grants in aid under the AFDC program. Secondly, it was contended, just as in the instant case, that establishment of slightly higher levels of payments to recipients within New York City denied equal protection to suburban recipients and conflicted with 42 U.S.C. § 302 (a) (1)—the identical claims here alleged.

A three-judge court was convened in *Rosado* pursuant to 28 U.S.C. § 2281 upon the motion of the defendants State Department and Commissioner. Following the May 2nd amendment of § 131-a(4) that Court dissolved itself (by order dated May 12, 1969) on the ground that the amendment had mooted the equal-protection issue. 304 F. Supp. 1354, 1356:

> "Pursuant to this new subdivision 4, the Commissioner of Social Services of the State of New York

* 304 F. Supp. 1354, 1356, 1381 (E.D.N.Y. 1969), aff'd in part and reversed in part 414 F. 2d 170 (2nd Cir. 1969), *sub judice* here (No. 540, Oct. Term 1969).

may—either on his own motion or after an application by a local Social Services Officer with the consent of the local legislative body or upon the petition of an aggrieved party, pursuant to Article 78 of the New York Civil Practice Law and Rules—provide schedules for monthly payments in all parts of the state which reflect differences in cost of living.

Under the circumstances it is apparent that the constitutional issue posed is no longer justiciable. The constitutional attack on the provision as originally adopted has been rendered moot and any attack on the newly adopted subdivision would not be ripe for adjudication by this Court until there has been an opportunity for action by state officials and until the matter comes before this Court in an appropriate proceeding."

The dissolution of the three-judge court in *Rosado* was affirmed by the Court of Appeals, Second Circuit, on July 16, 1969 (414 F. 2d 170). The majority opinion by Judge HAYS held that any determination by the three-judge court "would have been premature" and that "[t]he Court was right in refusing to act on facts that were fluid and subject to early change." It noted that it was "confirmed in this view by the fact that, since the dissolution of the three-judge court, the schedule of payments for Nassau County has in fact been increased by reason of the provisions of the amendment to Section 131-a. If corroboration of the opinion of the three-judge court be needed it is provided by this development." *Rosado* is presently *sub judice* in this Court, having been argued on November 19, 1969. The propriety of the dissolution of the three-judge court was among the points appealed by the petitioners (plaintiffs below).

D. The Instant Litigation.

Almost immediately after the Commissioner had announced his new schedules pursuant to § 131-a(4) the in-

stant litigation, precisely duplicating the claim in *Rosado*, was instituted by residents of Nassau and Westchester Counties for a judgment declaring that § 131-a was invalid. They claimed that the differential in assistance levels (1) denied them the equal protection of the laws, (2) and also violated both § 42 U.S.C. § 302(a)(1), which requires a State plan to "be in effect in all political subdivisions of the state," and a regulation of the United States Department of Health, Education and Welfare (herein "HEW"), 45 CFR § 233.20(a), which provides that state welfare programs "[s]pecify a Statewide standard" which "will be uniformly applied throughout the State" (A. 4, A. 11, A. 15). The plaintiffs, recipients of aid to the aged, blind and disabled, also sought an injunction against enforcement of the statute, only "on the ground that said grants and schedules are in violation of and inconsonant with the requirements of the federal Social Security Act and regulations * * *" (A. 19). The complaint sought no permanent injunction on the constitutional claim.

The action was instituted although *Rosado* v. *Wyman, supra,* was then on appeal to the Court of Appeals for the Second Circuit, although no county official had sought an increase of assistance standards as specifically authorized by § 131-a(4) and although no Article 78 proceeding had been instituted pursuant to the three-judge Court's decision in *Rosado.*

Contemporaneous with the institution of this action, on June 27, 1969, the Nassau County Commissioner of Social Services, with the approval of the local legislative body, applied for increased levels of payment to the Commissioner. This application was not ruled on because of the pendency of the instant litigation and became moot with the issuance of the preliminary injunction. On September 5, 1969 the Suffolk County Commissioner, with the approval of the local legislative body, applied for an increase in the level of payments to the recipients within his

county. That application similarly became moot with the issuance of the preliminary injunction. As of this date Westchester County has never applied for an increase nor have any other formal applications been received from Departments elsewhere in the State. Nor has any welfare recipient in either of those counties—or any other—instituted any proceeding to review the denial or to direct any county to apply for an increased level of allowances.

Together with service of their complaint here, plaintiffs moved before CONSTANCE BAKER MOTLEY, J. for a preliminary injunction on both the Constitutional and statutory claims. Defendants opposed both, on the merits and on the ground that the dissolution of the three-judge court in *Rosado* was dispositive here. Appellants were afforded no opportunity to present evidentiary material or even a memorandum of law on the propriety of the application to convene the three-judge court.

On July 7, 1969 the District Court granted the plaintiffs' application to convene the three-judge court (A. 35-A. 36) and argument was had before that Court (HAYS, C.J., MANSFIELD, D.J. and MOTLEY, D.J.) also immediately thereafter, on July 17, 1969. After the designation of the three-judge panel the District Court signed an *ex parte* order to take the deposition of defendant Commissioner Wyman. That deposition was held on July 15, 1969 (A. 40-A. 90).

On August 4, the Court decided to issue a preliminary injunction against implementation of § 131-a "other than according to objective, non-discriminatory standards based upon the cost of the needs of [welfare] recipients" (A. 120). It also denied defendants' motion for summary judgment and directed a trial (A. 120), which was adjourned pending disposition of this appeal. The order pursuant to this decision was signed on September 12, 1969 (A. 125-A. 126).

Thereafter plaintiffs Jones and Harvanek applied, by order to show cause dated October 6, 1969, to intervene on

behalf of AFDC recipients outside the City of New York (A. 127-A. 157). The Court granted such intervention over appellants' objection and, by order dated October 22, 1969, extended the preliminary injunction to them (A. 164-A. 166).

The Decision of the Three-Judge Court

The sweeping injunctions issued by the three-judge court rested on a finding that § 131-a violates the Equal Protection Clause. The Court did not reach the question of compliance with the Social Security Act (See *Rosado* v. *Wyman, supra*), deferring in favor of an administrative determination by HEW.

The Court conceded that the three-judge court in *Rosado* had before it the same issue and had dissolved itself. Yet it refused to follow that holding that the issue sought to be litigated here was not ripe for adjudication until there had been an opportunity for administrative action and an Article 78 proceeding* to review that administrative action or refusal to act. Instead, the Court stated that there had been administrative action "and it has failed to moot the issue", so that "[n]o reasons exist, therefore, for abstention" (A. 117).

In finding that § 131-a denied plaintiffs' right to equal protection the Court relied wholly on evidence of administrative practice and opinion in holding that the Legislature's action was without rational basis rather than

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* Article 78 of the Civil Practice Law and Rules of New York governs special proceedings which take the place of writs of mandamus, prohibition and certiorari. Such a proceeding is the available remedy to direct administrative action when such action is mandated by law, or to review an abuse of discretion by an administrative body. See *Matter of Schwab* v. *McElligott*, 282 N. Y. 182 (1940). It is a summary, expeditious proceeding and provides an ample remedy to plaintiffs here. Indeed, literally hundreds of Article 78 proceedings have been instituted in the past year or two seeking to review or compel administrative action by welfare officials.

relying on the language of the statute itself. In its injunction the Court did not distinguish between the statute which gave discretion to the Commissioner to raise the levels of assistance in other counties to meet New York City's and the administrative regulations of the Commissioner of the Department of Social Services which raised those levels but not to complete parity with those of the City.

The Court pointed out that the Department of Social Services did not, for reasons of impracticability, attempt to make a county-by-county cost survey of the items of basic maintenance (A. 106). It also noted that prior to the establishment of legislative standards the Department had divided the State into three geographical districts (A. 105). The Legislature did not perpetuate those districts. It established one level of assistance for the State outside the City and another level for New York City alone. The third fact on which the statutory court relied was the deposition of the Commissioner. The Court quoted him as "stat[ing] that he did not know why the Legislature differentiated between New York City and surrounding counties and that it was not done on his recommendation" (A. 106). The Court recognized that Commissioner Wyman had not proposed, drafted or approved the legislation. Nonetheless, the Court found that the Legislature, in distinguishing between the State's largest city, containing the largest number of welfare recipients, and the rest of the State, had acted irrationally despite the fact that it authorized the individual counties and the Commissioner to equalize payments if "the total cost of the items included in the schedule applicable to such district actually is more or less, as the case may be, than the cost thereof reflected in such schedule" (§ 131-a [4]).

In finding a denial of equal protection the Court egregiously disregarded the precept that constitutional issues are to be avoided if the case can be disposed of on other

grounds. It went on to overturn the strong presumption of constitutionality and carved out a special category of legislation, that dealing with welfare benefits. It denigrated and rejected out-of-hand the proof adduced by appellants that there was a higher actual cost of living to metropolitan residents not reflected in item-by-item specifications in the standard of need. It speculated as to the Legislature's motives and as to the material considered by it.

The end result was an assumption that in distinguishing between the 900,000 welfare recipients in New York City and the 300,000 recipients dispersed throughout the rest of the State the Legislature had created an "invidious" distinction (A. 113) requiring an injunction against enforcement of the statute even though the statute contains a built-in remedy for plaintiffs and even though the disparity in payments, even if it were of constitutional dimension, is the result of the administering of the statute, not the statute itself.

Summary of Argument

The statute here under attack was held to be valid on its face by the three-judge court in *Rosado* v. *Wyman* because it allows any county in the State to raise its level of allowances to the level of allowance provided in New York City on a showing of a higher cost of living than that represented in its present level of grant. The Commissioner has the power to raise the level on his own motion or upon application by a local Social Services official with the approval of the local legislative body. Essentially what the Legislature did was to set a level of payments throughout the State and because it had knowledge of the need for higher allowances in the large urban center where the overwhelming majority of welfare recipients reside, a slightly higher level there. But it did not preclude any other county from being treated equally upon a showing

of need. No showing of need was made by individual recipients or officials in Nassau and Westchester Counties where the plaintiffs reside before they prematurely instituted this action. Thus, there has been no showing of a denial of equal protection. In any event, this case is plainly wanting in equity and unripe for disposition since the statute itself contains an avenue for prompt redress of any inequality such as plaintiffs assert. Plaintiffs should employ § 131-a to obtain the increase they seek, instead of attacking it.

What plaintiffs assert in this case is a claim that Nassau and Westchester Counties are more like New York City than they are like the rest of the State and therefore the distinction in the statute between New York and the rest of the State was "irrational." Needless to say, New York City is unique in many ways. It is true that there are similarities between suburban areas around it and the metropolitan center; but whether, in a given case, the surrounding counties should be included with the metropolitan center is a matter on which reasonable men differ with regularity. The forum in which they do and should differ is in the legislative body. New York City has a disproportionate share of the welfare recipients in the State. The City recipients actually receive lower allowances since the amounts for rent (paid separately) are considerably less than they typically are in the suburbs. The costs of City living, including cleaning and laundry supplies, security devices for the home and general maintenance of severely deteriorating housing and the greater need for recreation for children, is substantially higher than it is elsewhere in the State. Nonetheless, the statute allows proof to the contrary. The only place where proof to the contrary has been offered is in the federal court below. This is hardly an appropriate forum, at least in the first instance, for the evaluation of such data.

Only by presuming that the Legislature acted irrationally could the District Court have reached the conclusion

that § 131-a(4) violated plaintiffs' right to equal protection. It ignored the fact that no invidious discrimination could possibly be imputed to a scheme which gave its small advantage to City residents over suburban, a group including a higher proportion of minority groups over a group having a lesser proportion, a group including a higher proportion of recipients of AFDC over a group having a higher proportion of recipients in the other categories of aid. The Court in ignoring the presumption in favor of legislative validity also forgot that geographical distinctions are not inherently suspect. On the contrary it found everything about the state legislation and administrative action inherently suspect, giving every presumption to those who oppose the legislation, and ordered two sweeping and totally unwarranted preliminary injunctions.

POINT I

The issue sought to be litigated is unripe for federal judicial determination since the statute explicitly provides a state administrative remedy and there also is a speedy judicial remedy.

Section 131-a(4) specifically authorizes the Commissioner to raise the level of public assistance in counties outside of New York City to the level set for New York City recipients. That authority is given to the Commissioner on his own motion or upon application of a county social services official with the consent of the local legislative body. The level is to be raised "if it is established that in such district the total cost of the items included in the schedule applicable to such district actually is more or less, as the case may be, than the cost thereof reflected in such schedule." If the Court below was correct and recipients in Nassau and Westchester County have in fact demonstrated that the cost of living in those counties is higher than the schedules applicable there, then § 131-a itself contains a plenary remedy—in the case of Nassau County,

an Article 78 proceeding in the nature of mandamus to compel a decision on the county's application, and in the case of Westchester County, an Article 78 proceeding to direct that county to apply to defendant. No such suit has been brought.

Clearly, the statute may not be said to offend the equal protection clause if a county, or a recipient in a county, has the power under the statute (read with the CPLR provisions [§§ 7801 *et seq.*]) to redress any grievance based on this asserted inequality. It is not the statute, but the administrative determination made thereunder, to which these plaintiffs' objections should be addressed.

At the time this litigation was instituted the Commissioner was not presented in an administrative context with the factual allegations presented in the District Court. No county official had sought an increase. No recipient had sought to compel the Commissioner to raise the level in that county. Indeed, this new statute—still less than a year old—which is before this Court for the second time has never been interpreted by the state courts. Two broad attacks have been mounted in the federal courts and no individual or county official has ever walked up the steps of a state court building and sought to enforce the rights explicitly conferred by § 131-a(4). Resort to the state courts was required by the holding of the three-judge court in *Rosado* v. *Wyman*, 304 F. Supp. 1354 (E.D.N.Y. 1969). Its dissolution was affirmed by the Court of Appeals of the very Circuit in which the Court below sat.

In *Rosado*, the three-judge court specifically noted (304 F. Supp. 1354, 1356):

> "Pursuant to this new subdivision 4, the Commissioner of Social Services of the State of New York may—either on his own motion or after an application by the local Social Services officer with the consent of the local legislative body or upon the petition

> of an aggrieved party, pursuant to Article 78 of the New York Civil Practice Law and Rules—provide schedules for monthly payments in all parts of the States which refleflct differences in cost of living."

This order, affirmed by the Court of Appeals and presently itself on review here, specifically held that an available state remedy existed through the expeditious, summary route of an Article 78 proceeding. That remedy is presently available to the plaintiffs. Because of the lack of equity alone, the issuance of the preliminary injunction here was improper since the court below should have considered "whether plaintiffs have an adequate, untried remedy under State law." *Schumann* v. *State of New York,* 270 F. Supp. 730, 732 (S.D.N.Y. 1967). See also *Douglas* v. *City of Jeannette,* 319 U. S. 157, 163. The Legislature properly provided that the Commissioner, the State official with experience and expertise in this field, with a staff of economists and statisticians and with an overall statewide view of the subject, should have the responsibility to determine the validity of applications to raise allowance levels of local units to the metropolitan level. There can be no "invidious discrimination" in a legislative scheme empowering the State Commissioner to create a statewide standard if in his judgment circumstances so warrant—with, as here, ample judicial review.

The Court below acknowledged the existence of this available state remedy but sloughed it off on the ground that it had "no assurance that the issues would be promptly resolved by any of the state court procedures suggested by defendants" (A. 117). This was, as we have seen, implausible in the context of the available state remedy, and amounted to a gratuitous slur on the courts of New York, which have been vigilant in protecting individual rights. The Court acted as though the administrative regulation issued by defendant Commissioner was the outer limit of his authority. But that regulation did not begin to ex-

haust his authority to redress any asserted differential under § 131-a (4) since at that time no official or any other person had brought evidence to the Commissioner to demonstrate the necessity for higher payments. The Court below, however, brushed aside this plain showing of unripeness. See Davis, Administrative Law, §§ 21.01 *et seq.*

Even if the Court mistakenly concluded the issue of constitutionality of the statute was ripe, it was totally improper for it to have refused to abstain until the state courts interpreted for the first time a newly-enacted state statute which had already been held to be valid on its face by the Court of Appeals in *Rosado.* Without any explanation the Court below proclaimed that this case was "Unlike the situation in *Harrison* v. *NAACP*, 360 U. S. 167 (1959) and *Fenster* v. *Leary*, 264 F. Supp. 153 (S.D.N.Y. 1966), aff'd 386 U. S. 10 (1967)." In fact this case is precisely like *Harrison* v. *NAACP.* The plaintiffs there attacked a newly enacted state statutory scheme. Despite the fact that the claims involved an infringement on plaintiffs' First Amendment rights and invidious discrimination on the basis of race, this Court held that the scope of the new statutes must be interpreted first in the state courts.

Here, the District Court effectively denied the state courts any opportunity to interpret this new statute. Furthermore, since plaintiffs also seek relief on statutory grounds, the Court below should have avoided the constitutional questions. Instead, it amazingly veered toward the constitutional issue, not away from it. In *Fenster* v. *Leary, supra*, the plaintiff resisted the District Court's holding that he must resort to the New York courts in the first instance, but when he took the less travelled road to the state courts he got a favorable ruling far broader than any issued by federal courts to this date. *Fenster* v. *Leary*, 20 N. Y. 2d 309 (1967).

This case is a far cry from the situation presented in *Zwickler* v. *Koota*, 389 U. S. 241, also relied on by the Court below. In that case, this Court relied on the fact that the challenged statute could not be interpreted in a way which would avoid the difficult First Amendment issues. *Id.* at 249-50. However, it cited *Harrison* v. *NAACP, supra,* as continuing to control situations in which a state statute could be so construed, as is the case here. Here there is every likelihood that the state statute can be construed to avoid constitutional problems since it permits resolution of the disparity at the administrative level. See *Rosado* v. *Wyman, supra.*

The two other cases relied on by the Court (*Baggett* v. *Bullitt*, 377 U. S. 360, and *Dombrowski* v. *Pfister*, 380 U. S. 479) are also completely inapplicable. They both involve the special problem of a statute alleged to be so vague on its face as not to give notice which acts are prohibited and which acts are not. In such cases this Court found that a state court interpretation of the statute would have been futile. Moreover, both cases involved sensitive areas of alleged restrictions on First Amendment rights.

The fact is that, unlike the statutes attacked in the cases relied on by the Court below (*Damico* v. *California*, 389 U. S. 416; *Dombrowski* v. *Pfister*; *Zwickler* v. *Koota*), § 131-a explicitly establishes a means of obtaining an increase in welfare payments in any county, up to the New York City level. The existence of this safety-valve under the statute renders this attempt to invoke the equity jurisdiction of the federal courts premature. Like the oft-stated requirement that federal courts abstain where a challenged state statute is capable of a constitutional interpretation (*Harrision* v. *NAACP*, 360 U. S. 167) or where a state ground for invalidating the statute exists (*Reetz* v. *Bozanich*, —— U. S. —— [decided Feb. 25, 1970], 38 USLW 4170), this built-in avenue of redress should have dictated judicial restraint

on the part of the Court below. Instead, it extended its jurisdiction to the breaking-point, and strained to reach the constitutional question.

See also *McNeese* v. *Board of Education*, 373 U. S. 668, 673:

> "Where strands of local law are woven into the case that is before the federal court, we have directed a District Court to refrain temporarily from exercising its jurisdiction until a suit could be brought in the state court [citing cases]. Thus we have stayed the hands of a Federal District Court when it sought to enjoin enforcement of a state administrative order enforcing state law, since any federal question could be reviewed when the case came here through the hierarchy of state courts."

Since this statute involves no area in which distinctions are inherently suspect (e.g., race) and no area of peculiar federal responsibility (e.g., voting, interstate commerce), and since the constitutionality of the statute need not have been reached at all, the lower Court should have stayed its hand and allowed the courts of New York the first opportunity to define the scope of the State's new welfare legislation.

POINT II

The slightly higher allowance provided for welfare recipients residing in the City of New York is rationally based on the higher actual cost of living in the large metropolitan center where recreational facilities are typically distant and needs for laundry, locks, replacement of stolen money and items, and other components are greater. This provision has a rational basis and does not deprive plaintiffs of equal protection of the laws.

The Court below improperly reversed the presumption of validity of the state statute—a presumption consistently expressed by this Court in the strongest terms (see *Ferguson* v. *Skrupa*, 372 U. S. 726)—and thrust the burden of proving its validity upon defendants, the State officials charged with its administration. In issuing these sweeping preliminary injunctions, the Court completely undermined the holding of this Court in *McDonald* v. *Board of Election Commissioners*, 394 U. S. 802, 809, that "Legislatures are presumed to have acted constitutionally even if source materials normally resorted to for ascertaining their grounds for action are otherwise silent, and their statutory classifications will be set aside only if no grounds can be conceived to justify them."

Statutory distinctions between the City of New York and the remainder of the State are common to New York law and have been repeatedly upheld as against claimed denials of equal protection in a variety of contexts. See, *e.g.*, *Matter of Hogan* v. *Rosenberg*, 24 N. Y. 2d 207, 216-218 (1969), app. dism. *sub nom. Puryear* v. *New York*, October 13, 1969 (No. 336, Misc.); *People* v. *Baldwin*, 24 N. Y. 2d 207 (1969), *sub judice* U. S. Sup. Ct. (No. 188, Oct. Term 1969) (upholding statute permitting jury trial for misdemeanor prosecutions except in New York City); *Spatt* v. *City of New York*, 14 A. D. 2d 30 (2d Dept. 1961) (sustain-

ing New York City compensating-use tax, which taxed property purchased by City residents outside New York City at higher rates than property purchased within the City).

Indeed, this Court used as an example of a valid geographical distinction one between New York City and the rest of New York State when it was dealing with a question of equal protection brought under a statute from another state. *Missouri* v. *Lewis*, 101 U. S. 20, 31, cited with approval in *Salsburg* v. *Maryland*, 346 U. S. 545, 551 n.:

> "There is nothing in the Constitution to prevent any State from adopting any system of laws or judicature it sees fit for all or part of its territory. If the State of New York, for example, should see fit to adopt the civil law and its method of procedure for New York City and the surrounding counties, and the common law and its method of procedure for the rest of the State, there is nothing in the Constitution of the United States to prevent its doing so. This would not, of itself within the meaning of the Fourteenth Amendment, be a denial to any person of the equal protection of the law."

The applicable rule in determining whether State enactments run afoul of the equal protection clause is whether there exists any rational basis for the classification. Only where the grounds employed by the State are "wholly irrelevant to the achievement of the State's objective" may the statute be struck down: *McGowan* v. *Maryland*, 366 U. S. 420, 425; *McDonald* v. *Board of Election Commissioners*, *supra*. See *Katzenbach* v. *Morgan*, 384 U. S. 641, 653:

> "It is not for us to review the congressional resolution of these factors. It is enough that we be able to perceive a basis upon which the Congress might resolve the conflict as it did."

A. The actual cost of living of a welfare recipient in New York City is in excess of that of a welfare recipient in the surrounding counties, and the Legislature was fully cognizant of this fact.

The Legislature was confronted with an extreme difference in the depth and complexity of the social problems within its territory. New York City is unique in the nation in the sheer number of welfare recipients within its borders and in the documentation of the life-style of those recipients. See, *e.g.*, "A staff report submitted to Senator William E. Adams, Chairman, Joint Legislative Committee to revise the Social Services Law, State of New York—The increase in public welfare in New York City: The thirty months from January, 1966 to June, 1968", by Staff Consultant, Lawrence Podell, center for the Study of Urban Problems, Graduate Division Bernard M. Baruch College, The City University of New York (November 1968); "Report of Findings of Special Review of Aid to Families with Dependent Children in New York City," transmitted to the Committee on Ways and Means by HEW and the New York State Department of Social Services on September 24, 1969 (Committee Print [Committee on Ways and Means, U. S. House of Representatives 91st Cong. 1st Sess.]; U. S. Govt. Printing Office, 1969). At the time of the enactment of this statute, New York City had approximately 900,000 of the State's 1,200,000 recipients of public assistance. Thus the position of New York City's welfare recipients was well documented and thoroughly studied.

The Legislature also knew that housing costs for New York City recipients were by far the lowest throughout the State, so that in fact New York City recipients received *less* money than the average recipient outside the City, since rent and fuel for heating are paid separately, over and above the monthly allowance (A. 97). The average rent for a family of four in New York City in 1968

was $83. Yet plaintiff Rothstein's rent is $103.25 per month for herself alone in Nassau County (A. 98)—nearly $20 higher than the average rent for a family of *four* on welfare in the City of New York. Plaintiff Batson similarly receives $108 per month for rent for herself alone in Westchester County (A. 99-A. 100). The chief reason for the low cost of housing in New York City is the existence of rent control in that City. Concomitant with the lower cost of housing provided by rent control is also a higher cost of maintenance and security since, in addition to the far greater incidence of burglary and robbery in New York City (See pp. 28-29, *infra*), rent control has resulted in the deterioration of buildings in the City. A new study of the effects of rent control has just been completed by the New York State Urban Development Corporation (see *New York Times*, Feb. 13, 1970, p. 1, col. 3; p. 43, cols. 5-8; Feb. 18, 1970, p. 44, cols. 1-2), and soon will be published in a book entitled "Agenda for a City; Issues Confronting New York," Walsh and Fitch, Editors, in the Chapter "Housing: Economic Facets of New York City's Problems" by Dr. Frank S. Kristof (Caledonia Press). The conclusion of that recent study is that rent control has caused extraordinary deterioration and abandonment of buildings in New York City that is in fact not comparable to the housing situation anywhere else. *Id.* at page 12. This condition is, as might be expected, far more prevalent in the sections of the City where the majority of its welfare recipients are forced by circumstances to reside. Specifically, with regard to its effect on the very poor, Dr. Kristof states (*id.* p. 2):

> "Even though rent control today provides predominantly reasonable-cost housing to the elderly poor and to low-income Negro and Puerto Rican families of the city, the price being paid in the form of deterioration and abandonment clearly is proving too high."

And at page 38:

> "The analysis carried out in the foregoing pages has demonstrated unequivocally that rent control has succeeded thoroughly in holding down the cost of housing for low-income, for elderly, and for minority-group families. But the price being paid for the rent savings to these families is so great in terms of deteriorating and lost housing units withdrawn from the inventory that the apparent savings to the beneficiary families are being swamped by the capital losses accrued through deterioration and abandonments. Even the crudest calculus makes this clear. The present costs of proper maintenance and the difference between controlled and decontrolled rents suggest that the upper limit of free market rents for rent-controlled apartments would be an increase of about $24 a month or twenty-seven percent higher than present rents."

Thus, it is clear that if statutory rent control in New York City were abolished the cost to the state, city and federal government for housing of welfare recipients in the City would be considerably greater. Dr. Kristof estimated the projected cost to the Department of Social Services of increased rents for the first year after any repeal of rent control at $30 million, and financial assistance to such tenants in order to halt further deterioration of these buildings at $1.5 million (*id.*, Table 12, p. 45). Thus, it is clear that rent control, which exists only within the political boundaries of New York City, has, whatever its other virtues, helped create a difficult situation for welfare recipients there in terms of housing deterioration; and the money to cope even ineffectively with that deterioration must come from the monthly allowances to be paid to these welfare recipients, rather than their rent budget.

Furthermore, there is a substantial difference in the sales taxes paid in New York City and in Nassau and

Westchester Counties. The City tax is 3% plus 3% State tax, making a total of 6%. The same tax in Nassau County is 2% County tax and 3% State tax, making a total of 5%. Westchester County has no sales tax, except for the City of Yonkers, which has a 2% tax (increased to 3% effective March 1, 1970). See CCH State Tax Reporter, Vol. 2, ¶ 60-416, pp. 6623-25. This in itself constitutes a substantial component of the slightly higher cost of living found by the Legislature to exist— and a factor of which the Legislature was obviously aware.*

Finally, another component of the higher cost of living in New York City, with heightened impact on its welfare recipients, is its far higher crime rate than that of the surrounding counties. There are no published statistics of the total crimes in Westchester and Nassau Counties. The unpublished statistics of the New York State Department of Correction for the last year for which totals are available (1967) demonstrates the following: In 1967 there were reports of 45,611 crimes in Westchester County (10,986 felonies, 1,191 serious misdemeanors and violations, 33,434 less serious misdemeanors and violations). In Nassau County for the same period there were 43,806 complaints of crime (15,402 felonies, 577 serious misdemeanors and offenses, and 28,227 less serious misdemeanors). In New York City for the same period there were 798,913 reports of crimes (371,672 felonies, 17,742 serious misdemeanors and violations, 409,499 less serious misdemeanors and violations). The population of Westchester County in 1960 was 808,891, of Nassau County

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* The Internal Revenue Service considers the allowable average deduction for sales tax (for a family of four with income of $3,000-$3,999) to be $46 where the sales tax is 3% (as in Westchester), $77 where it is 5% (Nassau), and $92 where it is 6% (New York City). The difference attributable to sales tax alone between Westchester and New York City is thus $4 per month for a family of four at the poverty level. See 1969 Optional State Sales Tax Levels, U. S. Int. Rev. Service (instructions to Form 1040).

1,300,171 and of New York City at the same time 7,781,984. Even considering the population difference, it is clear that the sheer density of crime—especially of serious crimes—in New York City makes it a far more virulent (and costly) fact of life for the City welfare recipients than it is for their counterparts in the surrounding counties. This Court may take judicial notice of the fact that crime is costly (in terms of stolen goods and money, locks, etc.) and that crime is more prevalent in neighborhoods where welfare recipients are apt to live.

The effect of crime on New York City welfare recipients is acute and dramatic. In one typical month, March 1969, there were 18,860 special grants by the New York City Department of Social Services for stolen welfare checks, amounting to $985,480, as well as 2006 grants for stolen cash, amounting to $71,025. No statistics as to these thefts are even kept in the outlying counties.

Further, an overwhelming majority of welfare recipients in New York City receive AFDC (657,089 out of 880,262). Life for the child in the great urban center has particular characteristics. On the one hand he has free recreational facilities (parks, zoos, beaches, museums) and reasonably-priced transportation available. On the other hand, he does not have the casual recreation of safe play in the streets and yards—available in most areas outside New York City.* The Department of Social Services and Legislature were, or must be presumed, to have been, well aware of these facts which are almost truisms. The

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* As this Court may take judicial notice and as the Commissioner and Legislature were well aware, most New York City residents—and a substantially higher proportion of welfare recipients—live in apartments, many in congested areas with few playgrounds and often distant from parks. For example, the South Bronx areas of Mott Haven, Hunts Point and Morrisania, in which tens of thousands of welfare recipients live, consist almost exclusively of tenement buildings, with almost no private houses, and do not contain a single park of appreciable size.

slightly increased grant to New York City recipients was a legislative recognition of this fact. This purpose was expressed by defendant Commissioner Wyman precisely (A. 59):

> "The essential difference is in the complexities of urban living in the City of New York, the necessity for provision of transportation items on a regular basis, the fact that there are cultural opportunities, readily available transportation, community center facilities, and clinic facilities in New York City that are not available in other areas of the state to the extent, certainly not the components of the urban living requirements."

This precise testimony by the State official whose professional experience and expertise have been addressed to these very problems, in addition to that contained in the affidavit submitted by the defendants (A. 92-A. 104), is the only evidence of legislative intent in this record. It provided far more than the requisite rational basis for the statutory distinction here questioned. What New York here did was "[i]n acceptable legislative fashion," to "limit its attention to the geographic areas where immediate action seemed necessary." *South Carolina* v. *Katzenbach*, 383 U. S. 301, 328.

B. The Court below impermissibly carved out a more rigorous standard for statutes relating to welfare allowances.

The Court below, incredibly, sloughed off all this proof as no more than an "assumption" which "we find ourselves unable to accept" (A. 115). It impermissibly substituted its own opinion for that of the Legislature. See *Ferguson* v. *Skrupa*, *supra*, 372 U. S. at 728-730; as well as the extremely apt language of *Snell* v. *Wyman*, 281 F. Supp. 853, 862, 863 (S.D.N.Y. 1968), aff'd 393 U. S. 323:

> "Plaintiffs' complaints might move us to vote for changes if we sat as state legislators. But they do not

approach the showing of irrationality or arbitrariness warranting exercise of the limited veto power of the federal judiciary under the Fourteenth Amendment.

Against plaintiffs' views, as defendants point out there are arguments of policy which can scarcely be dismissed as frivolous, whether or not we would find them convincing if the judgment of policy were for us. * * *

It is appropriate from time to time to appreciate the full measure and continued vitality of what Mr. Justice Holmes meant when he said: 'The 14th Amendment does not enact Mr. Herbert Spencer's Social Statics.' Lochner v. State of New York, 198 U. S. 45, 75, 25 S. Ct. 539, 546, 59 L. Ed. 937 (1905) (dissenting). Now that his dissenting thought has won the day, we ought not to trivialize the achievement by viewing it only as the interment of Spencer's social doctrines. The principle applies to the social philosophers that most of us, including judges, find more persuasive than Spencer. If we were free to enforce what we may modestly deem our more enlightened view, we might seriously consider the changes plaintiffs propose. But we have no such power, and it is better in the end for everyone that this is so. * * *

The principle counsels that it is not for federal judges to be 'liberal' or 'conservative' in advancing and ordering measures which undoubtedly relate to basic matters of human decency and welfare. The constricted test in this forum is one of minimal rationality."

Judge MANSFIELD's opinion, in denigrating and in effect disregarding the *only* evidence of legislative intent in the record, suggested that the aged, blind and disabled were unable, "in view of their physical handicaps, to make any appreciable use of many of the facilities described by the

defendant" (A. 115-A. 116). This statement, superficially irrefutable, egregiously ignores the fact that in New York the welfare allowances are uniform for all recipients, of whom the overwhelming preponderance are AFDC recipients.* The standards on which the differential was based are plainly applicable to AFDC recipients, who by definition are children and their unemployed parents.

Thus, the Legislature had the right to base its differential on a reason applicable to the greatest number of recipients since in New York all classes of welfare recipients receive the same allowance. When the Court permitted intervention of AFDC recipients as parties plaintiff and extended the preliminary injunction to their class (A. 164-A. 166) it completely repudiated its prior assertion that the State Legislature's compassionate reasons for providing a slight additional allowance in the case of children residing in the City of New York must be ignored because the plaintiffs were recipients of adult assistance.

The Court likewise disregarded the fact (A. 93) that the New York City Department of Social Services, in applying for permission to establish a 1968 program in which special grants to welfare recipients were replaced by a cyclical grant of $100 per year, stated that "the nature of the urban crisis and the higher social cost of living in the metropolitan center requires a differential assistance level in these areas." This application was approved by defendants and by HEW, and was reflected in the differential in § 131-a. The cyclical grant in New York entitled a family of four in the City to $400 more a year or $25 more a month than recipients residing outside the City. This was a flat grant usable for any purposes chosen

*New York State has 880,860 recipients of AFDC out of a total of 1,210,601 welfare recipients (1968 figures). Under a demonstration project, effective September 25, 1969, AABD recipients are receiving increments of $8 per month, state wide, if living alone, and $5 if living with a family. See page 8, *supra*

by the recipients. It is interesting to note that this amount of $25 a month difference between New York City and the rest of the State is precisely the difference between $208 provided as a general allowance in New York City and the $183 provided by statute for the rest of the State (§ 131-a[2, 3]).* It is true that this cyclical grant replaced certain special grants which were available to recipients outside the City but those special grants were earmarked for a particular purpose for which individual eligibility had to be shown, and did not become part of the recipient's projected income. Thus, the Legislature was free to recognize that if in fact New York City and the rest of the State were treated equally, the City recipients would suffer a loss of income not suffered by the other recipients.

It is ironic that the District Court cast its attack on the statute in terms of objecting to the use of AFDC criteria in providing a differential to all City of New York recipients (of whom AFDC recipients constitute the overwhelming preponderance). Not all states pay identical allowances to AFDC and adult recipients. And in states which pay less to AFDC families that disparity has been attacked as a denial of equal protection. See *Jefferson* v. *Hackney*, 304 F. Supp. 1332 (N. D. Tex. 1969); *Lampton* v. *Bowen*, 299 F. Supp. 336 (E. D. La. 1969).

What the Court below demanded of New York was just that "mathematical nicety" which this Court has declared *not* to be required by the equal protection clause. *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U. S. 61, 78-79. As the Court held in *Jefferson* v. *Hackney*, "There remain priorities in time and functions in alleviating human misery. Unless the Court mandates that all human needs be met, we must accept classifications and piecemeal solutions

* This difference was reduced by the Department's order of June 5, 1969 halving the differential. See page 8, *supra*.

which are not egalitarian between all programs and all human beings." See also *Williamson* v. *Lee Optical of Okla., Inc.*, 348 U. S. 483, 489.

The *Jefferson* decision rejected the very conclusion on which the Court here so heavily relied—that the subject matter of this statute in some strange way automatically rendered inapplicable the rule that legislative distinctions be sustained unless patently irrational, and placed the burden on the State to demonstrate some "compelling interest" in the differential. As the Court in *Jefferson* ruled, the considerations which thrust that burden on the states in the cases cited by the plaintiffs there (and by the plaintiffs and the three-judge court here) are inapplicable to a statute establishing welfare allowance levels. No impairment of the right to travel is involved, as in *Shapiro* v. *Thompson* (394 U. S. 618), or on the right to vote, as in *Harper* v. *Virginia Board of Elections* (383 U. S. 663). ~~There is no analogous constitutionally protected right to~~ There is no analogous constitutionally protected right, such as the Court below created, to any particular level of welfare benefits. Nor could there be, in view of current proposals by numerous enlightened commentators, as well as the current Administration proposal pending in Congress, to dismantle the entire welfare structure and replace it with some completely new program, such as guaranteed income. Thus the disposition below, which shifted the burden of showing legislative intent from the attackers to the defenders of the state, was plainly improper.

In *Jefferson*, the Court went on to hold that statutes providing for welfare allowances "must be determined by traditional equal protection standards," citing *McDonald* v. *Board of Election Commissioners*, *supra*, in which this Court rejected a parallel argument that the "compelling state interest" standard be applied to a statute denying absentee ballots to persons jailed awaiting trial. In *McDonald*, as here, the distinctions were not "drawn on the basis of wealth or race, * * * two factors which would independently render a classification highly suspect and

thereby demand a more exacting judicial scrutiny.'' 394 U. S. at 807. After holding, as we have seen, that "Legislatures are presumed to have acted constitutionally even if source materials normally resorted to for ascertaining their grounds for action are otherwise silent" (*id.* at 809), this Court ruled (*id.*):

> "With this much discretion, a legislature traditionally has been allowed to take reform 'one step at time, addressing itself to the phase of the problem which seems most acute to the legislative mind,' Williamson v. Lee Optical of Oklahoma, Inc., 348 U. S. 483, 489, 99 L. Ed. 563, 573, 75 S. Ct. 461 (1955); and a legislature need not run the risk of losing an entire remedial scheme simply because it failed, through inadvertence or otherwise, to cover every evil that might conceivably have been attacked. See Ozan Lumber Co. v. Union County National Bank, 207 U. S. 251, 52 L. Ed. 195, 28 S. Ct. 89 (1907)."

Indeed, this Court's opinion in *Shapiro* v. *Thompson*, *supra*, on which the Court below relied, is evidence that welfare is not a subject entitled to particular constitutional protection, else the right protected in *Shapiro* would have been the right to welfare rather than the right to travel which was affected less directly by the offending legislation. This is not to dispute the fact that the level of welfare benefits is very important to the plaintiffs, as it clearly is. But importance to one's life is not the measure of whether the area of legislation is protected by the Bill of Rights. The rights of voting, freedom of religion, free speech and public assembly are not of direct economic importance in the daily lives of most of us, but they are at the heart of our form of government. Thus, they occupy a place of special importance in the Constitution.

The Bill of Rights, to which the Court below would analogize the privilege of receiving welfare, protects

against government interference. But the order below cannot be reasonably construed as protecting the plaintiffs from interference by the government. Quite the contrary, the order demands further affirmative action on the part of the State. For this reason, all else aside, the lower Court exceeded its jurisdiction—in ordering the Legislature to spend State moneys. *Rosado* v. *Wyman*, *supra*, 414 F. 2d 170, 176; *Williams* v. *Dandridge*, 297 F. Supp. 450, 459 (D. Md. 1968), *sub judice* here (No. 131, Oct. Term 1969); *Westberry* v. *Fisher*, 297 F. Supp. 1109, 1116 (D. Me. 1969).

It is clear that the only right plaintiffs can claim is the right to be equally treated. There is no contention here that poor persons are treated differently from the rich, or black from white. The differential here is geographical. No badge of inferiority is connected with being a Nassau or Westchester County welfare recipient as opposed to being a New York City welfare recipient. Thus the test is the test of minimum rationality and the strong presumption of constitutionality of the statute (*Ferguson* v. *Skrupa*, *supra*) governs this case. By any fair application of those standards, the statute does not offend the equal protection clause.

The opinion below leaves no doubt that its objective is to obtain higher levels of benefits to the plaintiffs (A. 106, A. 108 A. 109, A. 112, A. 115 A. 117, A. 120). Suppose the statute had made the levels outside New York City inflexible and New York City's higher level flexible—that is, permitted the Commissioner to lower the level of New York City's benefits. It is inconceivable that the District Court would have adopted the same reasoning and reached the same conclusion. Plainly, in straining to place welfare-allowance statutes in a rarified atmosphere of unusual vulnerability, the Court below was exceeding its function on judicial review and allowing its views of policy to swamp its objectivity.

Under the applicable test—whether "no grounds can be conceived to justify" the differential (*McDonald*, *supra*, at

p. 809), plaintiffs' assertions collapse. No doubt reasonable minds might differ as to the existence, or extent, of the greater social cost of residing in the City of New York.* But once that be conceded—as it must—judicial inquiry is foreclosed. *Ferguson* v. *Skrupa, supra* (372 U. S. at 730):

> "We have returned to the original constitutional proposition that courts do not substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws. As this Court stated in an unanimous opinion in 1941,** 'We are not concerned . . . with the wisdom, need or appropriateness of the legislation.' Legislative bodies have broad scope to experiment with economic problems and this Court does not sit to 'subject the State to an intolerable supervision hostile to the basic principles of our Government and wholly beyond the protection which the general clause of the Fourteenth Amendment was intended to secure.'"

In fact what the court below did here was precisely what this Court condemned in *Ferguson* and *McDonald*. It violated the tenet of Mr. Justice HOLMES' dissent in *Tyson & Bro.—United Theatre Ticket Offices* v. *Banton*, 273 U. S. 418, 445-446, by failing "to recognize that a state legislature

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*It is noteworthy that the actual average payments per recipient even prior to the enactment of § 131-a were, because of a much greater frequency of special grants, substantially higher within New York City:

Programs	New York City	Suburban Counties	Urban Upstate Counties	Remainder of State
AFDC	$ 72.28	$60.32	$50.51	$39.07
AFDC-Unemployed Fathers	$ 72.89	$57.68	$42.30	$34.92
Medical Assistance	$123.57	$91.55	$69.65	$57.48
Home Relief	$ 43.68	$30.53	$27.84	$20.11

**Olsen* v. *Nebraska*, 313 U. S. 236, 246.

can do whatever it sees fit to do unless it is restrained by some express prohibition in the Constitution of the United States or of the State, and that the Courts should be careful not to extend such prohibitions beyond their obvious meaning by reading into them conceptions of public policy that the particular court may happen to entertain."

C. The slight differential among the Social Services Districts is a geographical distinction, presumptively valid.

In some sense the differential in payment between New York City and the rest of the State, based, as we have seen, on compassion, is analogous to a matching grant program since county welfare officials are empowered to make application for increased amounts on the approval of the appropriate legislative body. This demonstrates the State Legislature's concern for the ability to pay of the various welfare districts since they would be required to pay one-quarter of any increase over the established levels. See the cases upholding differentials in school aid (p. 39, *infra*).

Such geographical differentials in welfare payments are not unusual. In California, for example, counties are authorized to pay amounts over the state allowance, and these amounts vary from $5.35 per person per month in San Francisco County to $.13 in Fresno County. Los Angeles County pays $2.40 per month, while neighboring Orange County pays $1.02. Calif. Welfare & Insts. Code §§ 11450-52; see "Equal Protection Aspects of Inequalities in Public Education and Public Assistance Programs," 15 UCLA Law Rev. 787, 812-815 (1968).

Implicit in plaintiff's argument is an insistence that the Constitution requires every welfare recipient to receive the same allowance (unless the State can show a difference in cost of living). But this is a grotesquely unreal supposition. Whether or not based on the ability of various districts to pay, there are striking inequities in welfare payments among the various states. AFDC recipients in New York receive an average of $278 per month for a family

of four; in Mississippi, $55. Among Northeastern states, where the cost of living is essentially the same, the average monthly allowance to an AFDC recipient varies from $71.75 in New York to $52.00 in Connecticut, $47.80 in Rhode Island, $38.55 in Pennsylvania and $32.25 in Delaware. See Appendix, *Rosado* v. *Wyman*, page 106. If it be argued that each state is sovereign and free to set its own level, it should be noted that the federal government pays approximately half of these amounts.

Moreover, there is no constitutional requirement that identical grants be made to each locality within a given state. See *McInnis* v. *Shapiro*, 293 F. Supp. 327, 336 (N. D. Ill. 1968), aff'd *sub nom. McInnis* v. *Ogilvie*, 394 U. S. 322, rejecting a claim of denial of equal protection resulting from variations in aid-per-pupil to school districts ("Nor does the Court establish the rigid guideline of equal dollar expenditures for each student.") Also see *Burruss* v. *Wilkerson*, —— F. Supp. —— (D. C. Va., decided May 23, 1969) aff'd —— U. S. —— (No. 864 Oct. Term, 1969, decided February 24, 1970), 38 USLW 3319. Geographical distinctions are not "inherently suspect" as are those, for example, based on race or wealth. And the States' reasonable classifications in this area are not subject to constitutional challenge. *Detroit Edison Co.* v. *East China Tp. School Dist. No. 3*, 247 F. Supp. 296 (E. D. Mich. 1965), aff'd 378 F. 2d 225, cert. den. 389 U. S. 932.

New York legislation has treated the City of New York as *sui generis* in numerous cases. See *Matter of Hogan* v. *Rosenberg*, *supra*; *Spatt* v. *City of New York*, *supra*; *DiPrima* v. *Wagner*, 14 A. D. 2d 36 (1st Dept. 1961), aff'd 10 N. Y. 2d 728; *Adler* v. *Deegan*, 251 N. Y. 467 (1929). The entire Multiple Dwelling Law of New York is limited in its application to the City of New York. The Court system and large portions of the Code of Criminal Procedure differ markedly as between the City of New York and the remainder of the State. These instances of the pattern

of legislative differentiation between the City and the rest of the State are far more pervasive than the one attacked here.

In *South Carolina* v. *Katzenbach*, 383 U. S. 301, 328, this Court upheld the authority of Congress to deal with the problem of voting discrimination in areas where it was established to be most serious. There, unlike the instant case, the constitutionally protected right to vote was involved yet the classification adopted by Congress was sustained in the absence of an affirmative showing of irrationality. The plaintiffs have made no such showing here.

Indeed, far from showing the requisite invidious distinction, the plaintiffs failed to show any distinction at all. As we have shown, the plaintiffs actually receive higher welfare benefits than average New York City recipients since the amount paid to them for rent, over and above the monthly grant, is so much higher. This alone demonstrates the conjectural nature of the claim of invidious discrimination here, and the impropriety of the injunctions. This is bolstered by New York City's higher maintenance and security costs and higher crime rate (see pp. 25-27, *supra*).

The only factual evidence offered by the plaintiffs was to the effect that the costs of transportation in Nassau County exceeded that in New York City, but this undisputed fact would be relevant only if the Legislature had not provided a differential for New York City recipients based upon a greater need for transportation to recreational and cultural facilities. Since City welfare recipients were determined by the Legislature and by defendant Commissioner to require transportation with far greater frequency, the Legislature clearly had a right to grant an additional stipend for that purpose. And, it is to be noted, the Commissioner, pursuant to the discretion vested in him by [illegible], has already substantially increased the allowance paid to recipients outside New York City, thereby nearly halving the differential. See page 8,

In any event, as we have shown, the differential here was prompted by humane motives. It cannot be said to be "invidious" unless that word be stripped of all content and reduced to a logical cliche.

D. The State legislation fully complies with the Social Security Act and that issue must, in any event, be determined administratively in the first instance.

objective" of protecting recipients "from adoption of different schedules standards or other criteria for different areas" (A. 119). The court itself deferred determination of this contention "in anticipation of a ruling by HEW" (A. 119), and did not base its injunction on that claim.

This disposition was plainly correct and should have been a basis for denial of the preliminary injunction. See *Catholic Medical Ctr. v. Wyman*, 305 F. Supp. 1256, 1260 (E.D.N.Y. 1969), in which the three-judge court (Mansfield, C.J., Mishler, D.J. and Judge, D.J.) deferred determination of the validity of New York's Medicaid provisions, also challenged on both constitutional and statutory grounds, "until the United States Secretary of [HEW] has an opportunity to express his views." The court relied on *Udall v. Hollo Hill Farms Products, Inc.*, 377 U.S. 447, 449, that "[s]ince HEW is not a party to this litigation, it was not present to defer decision of the motions for a short period in order to hear from the Department. It may be that HEW has dealt with similar problems in some other state, that it has relevant negotiations under way, or that it will point to some part of the statutory scheme for its participation that we have overlooked."

To have enabled the State with the sweeping preliminary injunction such as was imposed here, and then to extend the injunction to a far larger group of recipients in advance of trial, was an abuse of discretion. The court below employed the wrong test in determining the validity of the state welfare programs, ignored the demonstration of rational legislative purpose provided by defendants, and impermissibly substituted its opinion on policy matters for that of the state legislature.

* The court also dismissed HEW as a party on the ground that it had no claim against the defendants on the merits which are involved here. 305 F. Supp. 1256 (1969).

CONCLUSION

For the foregoing reasons the order of the District Court should be reversed and the case remanded with directions that defendants' motion for summary judgment be granted.

Dated: New York, New York, March 13, 1970

Respectfully submitted,

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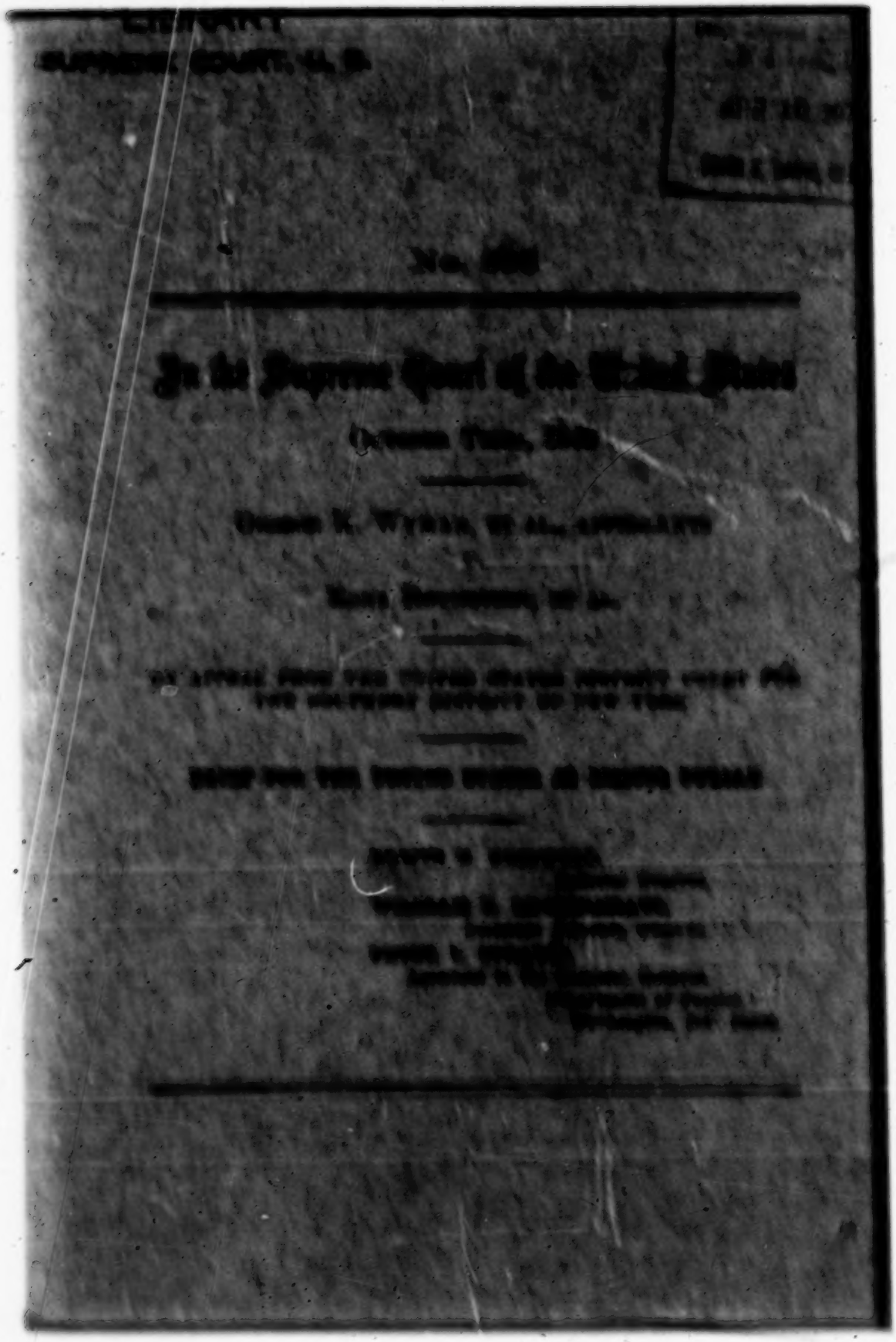

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In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 896

GEORGE K. WYMAN, ET AL., APPELLANTS

v.

EDNA ROTHSTEIN, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

INTEREST OF THE UNITED STATES

As in *King* v. *Smith*, 392 U.S. 309, this case presents both constitutional and statutory challenges to a provision of a state public assistance program which is funded by the federal government under the Social Security Act. The case was decided below on constitutional issues. As in *King*, however, the statutory ground remains an alternative basis for decision. Cf. *Rosado* v. *Wyman*, No. 540, this Term, slip op. p. 3, decided April 6, 1970; *Dandridge* v. *Williams*, No. 131, this Term, slip op. p. 4, n. 6, decided April 6, 1970. While—again as in *King*—the district court has not

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ruled on the statutory questions, preferring to await administrative action, the correctness of that postponement has now been cast in serious doubt. *Rosado, supra,* slip op. pp. 3, 7–8. We submit this brief to inform the Court of the view of the Department of Health, Education, and Welfare regarding the conformity of the challenged New York practice to the requirements of federal law, and of the statutory and regulatory basis for that view.

QUESTION PRESENTED

Whether the New York state plan of public assistance conforms to the federal standard requiring uniform, statewide administration of the plan, or improperly favors residents of New York City over residents of other areas of the state.

STATEMENT

Appellees receive aid to the aged, blind, or disabled (AABD) or aid to families with dependent children (AFDC) under the Federal-State public assistance programs established pursuant to Titles Sixteen and Four-A of the Social Security Act, 42 U.S.C. 1381 *et seq.*, 601 *et seq.* Appellees reside in Nassau County and Westchester County, New York. Under the New York Social Services Law, Sections 131 *et seq.*, and regulations promulgated thereunder by the New York Department of Social Services, they receive lower payments than similarly situated recipients who reside in New York City.

Prior to the recent adoption of Section 131–a of the New York Social Services Law, the New York statute did not prescribe schedules of payments. The New

York Department of Social Services determined the standards of need, recognizing basic needs for all eligible individuals, including certain items of food, clothing, and utilities. The State was divided into three zones for welfare allowance purposes as follows (statistics for family of four as of 1968, excluding rent and fuel):

SA–1 (New York City, Dutchess, Greene, Monroe, Nassau, Suffolk, Ulster and Westchester Counties)	$152–221
SA–2 (All counties not in SA–1 or SA–3)	149–218
SA–3 (Allegany, Cattaraugus, Chautauqua, Erie, Genesee, Niagara, Steuben and Wyoming Counties)	146–215

These $3-per-family differences turned on local variations in the average cost of utilities. The variation within each region depended on the age of the oldest child in each family. Rent and fuel for heating were provided separately to each individual or family as needed. In addition, a number of "special need" items were recognized for those individuals or families found to need them.

Section 131–a (N.Y. Laws of 1969, ch. 184) was enacted on March 31, 1969. It established two schedules of maximum flat monthly grants of public assistance (exclusive of shelter and fuel for heating) allowable to recipients, one applicable to New York City and the other applicable to all other social service districts in New York State, as follows:

	Number of persons in household							
	1	2	3	4	5	6	7	Each additional
New York City	70	116	162	208	254	297	340	43
Outside New York City	60	101	142	183	224	257	290	33

As subsequently amended (N.Y. Laws of 1969, ch. 411), Section 131-a permits the State Commissioner to raise or lower this statutory schedule, for all districts except New York City, upon a showing that the cost of the items in the schedule warrants the change. Thus, Section 131-a has a five-fold effect: (1) it provides statutory maximums; (2) it provides a single amount for the basic needs of families of a given size, other than shelter and fuel for heating, and does away with the differentials based on the age of the oldest child; (3) it eliminates the former provision for items of "special need";[1] (4) it sets a fixed level of benefits for New York City; and (5) it sets a uniform lower level of benefits for all other areas of the state, which may be reduced or increased (up to the New York City level) on the basis of the cost of the items included in the schedule.

Under this authority, the New York agency has promulgated the following schedules for a family of four:

SA-1 (New York City)	$208
SA-2 (Dutchess, Greene, Monroe, Nassau, Suffolk, Ulster and Westchester Counties)	191
SA-3 (All Counties not in SA-2 or SA-4)	188
SA-4 (Allegany, Cattaraugus, Chautauqua, Erie, Genesee, Niagara, Steuben and Wyoming Counties)	185

Since the statutory "maximum" for New York City is $208 and for all other districts, $183, this action has reduced the difference between the counties involved

[1] The discontinuance of these special need items in the AFDC program was found to be contrary to the provisions of Section 402(a)(23) of the Social Security Act, 42 U.S.C. 602(a)(23), in *Rosado*, *supra*.

in the present case (schedule SA–2; $191) and New York City ($208) by approximately one third.

After these schedules were adopted, the Regional Commissioner of the Department of Health, Education, and Welfare's Social and Rehabilitation Service wrote appellant Wyman, questioning whether they are consistent with the requirement of the federal statute that federally funded plans be statewide in application, with any variations in payments based on actual differences in the local costs of the items included in the state's standard of need. See the Appendix, *infra*. After pointing out the Commissioner's reasons for questioning the schedules' differentials, the letter concluded:

> In summary, the State standard must represent items of need to be made available to all recipients statewide. Differences in money amounts, if they exist, must result from demonstrable differences in the cost of these items in various sections of the State. Given the materials submitted to date, we are unable to find that there is in effect a statewide standard being uniformly applied throughout the State. We will, of course, give full consideration to any other information or comments which you may wish to submit.
>
> We would appreciate as prompt a response as possible, whether in the form of a written reply or by way of a meeting with your staff.

The State agency has not responded in writing, and staff discussions have not yielded any acceptable

showing to support the difference in the New York schedules for the various localities.[2]

Appellees, who were not and could not have been parties to these negotiations, brought this action in the United States District Court for the Southern District of New York, challenging Section 131–a both as a denial of equal protection and as in conflict with the "statewide standard" requirement of the Social Security Act and the Department's regulations. A three-judge court was convened, and granted preliminary injunctive relief to appellees enjoining the state from promulgating schedules of grants and allowances of public assistance, and from making payments of such assistance, except according to objective, non-discriminatory standards based upon the cost of a recipient's needs. This relief was granted on the constitutional ground. Although the court indicated that Section 131–a was itself sound, it found on the basis of the record before it that the schedules adopted under it were in probable violation of the Equal Protection Clause. In view of that determination, and in order to permit further interpretation of the applicable rules by the Department in the pending proceedings, the court declined to pass upon the conformity

[2] Although bills were introduced in the New York Legislature to establish a uniformly applicable statewide standard of assistance, the Legislature has recently amended Section 131–a, effective April 1, 1970, to retain separate schedules for New York City and for the rest of the State; the "maximum" figures are set about 10% higher. No change has been made in that part of section 131–a which permits the State agency to promulgate a lower or a higher amount (up to the New York City level) for districts other than New York City, on the basis of the cost of the items included in the schedule.

question "at this stage." (J.S. App. 19a.) It intimated its view, however, that that question would be resolved in the same way as the constitutional issue—against the validity of the state schedules.

ARGUMENT

NEW YORK'S SCHEDULES OF ALLOWANCES FOR NEED ARE CONTRARY TO THE SOCIAL SECURITY ACT AND THE APPLICABLE FEDERAL REGULATIONS IN THE ABSENCE OF A SHOWING THAT THE DIFFERENTIALS BETWEEN DISTRICTS REASONABLY CORRESPOND TO ACTUAL DIFFERENCES IN THE COST OF THE ITEMS CONSIDERED IN DETERMINING NEED

The conformity issue in this case arises substantially out of the obligation of states participating in plans under the Social Security Act to provide for *statewide* operation of the plans. Thus, a participating state's plan must be in operation in every political subdivision of the state, and if administered by the subdivisions, must be mandatory upon them. 42 U.S.C. 602(a)(1), 1382(a)(1). There must be a single state agency to administer or supervise the plan. 42 U.S.C. 602(a)(3), 1382(a)(3).

One aspect of a plan is the standard of need. The Social Security Act public assistance programs provide for financial assistance to "needy" individuals and families. 42 U.S.C. 606(a), 1385(a). While the states have, in general, "undisputed power to set the level of benefits and the standard of need," *King, supra,* 392 U.S. at 334, they are obliged to create such a standard, sometimes also referred to as the "standard of assistance" or the "assistance budget." *Rosado,* slip op. 10. The requirement is not explicit in the

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Act (but cf. 42 U.S.C. (Supp. IV) 602(a)(23)), but has been required by federal regulations since the Act was enacted. 45 C.F.R. 233.20(a) (34 Fed. Reg. 1394 (1969)).[3] One could hardly describe who are "needy" individuals for purposes of State eligibility and Federal matching unless there were a standard of need. Similarly, the State plan requirement that the State agency shall, in determining need, take into consideration any other income and resources of the claimant, 42 U.S.C. 602(a)(7), 1382(a)(14), could not be carried out rationally without a standard of need against which the income and resources could be considered.

From the requirement of a statewide plan, it follows that the standard of need, required as part of that plan, must also be statewide. In addition, it must be "objective and equitable."[4] 45 C.F.R. 233.20(a)(1). The federal agency has consistently taken the view that the several provisions of the public assistance

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[3] The Department is in the process of changing from its former practice of reliance on regulations published in its Handbook of Public Assistance Administration to publication in the Federal Register. Although only recently published in the Federal Register, the underlying principles and many of the specific provisions have long been reflected in the Handbook.

[4] Since the principle of equitable treatment, in this case, is derived in part from the statutory scheme and its purposes, it has a wider sweep than constitutional requirements of due process and equal protection, standing alone. Compare *Dandridge* v. *Williams*, *supra*, slip op. pp. 12–15. Constitutional principles of reasonable classification must in any event be met; but the statutory principle may also exclude differences in treatment of individuals which may not be so invidious as to offend the constitutional bar. For example, in this case the claim of invidiousness is not that Section 131-a of the New York Statute made an improper classification, but that the administrator, in adopting regulations (the

titles of the Social Security Act, in combination, require that a state plan provide for equitable treatment of individuals assisted under it.[5] Thus, federal regulations require as a general proposition that State public assistance plans must provide that the determination of need and the amount of assistance for all applicants and recipients will be made on an objective and equitable basis. 45 C.F.R. 233.20(a)(1). The state plan must specify a statewide standard, expressed in money amounts, to be used in determining the need of applicants and recipients and the amount of the assistance payment. 45 C.F.R. 233.20(a)(2)(i). The plan must further provide that the standard will be uniformly applied throughout the state. 45 C.F.R. 233.20(a)(2)(iii). The plan must include the method to be used in determining need, which must be either a method recommended by the Department or a com-

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schedules), failed to apply it in an objective and equitable manner, leading to an invidious result. It may be more difficult in these circumstances to find the regulations unconstitutional than to conclude that—by failing properly to apply a correct, established standard—their adoption did not meet the test of equitable treatment.

[5] In addition to the provisions discussed above in the text, at least the following statutory requirements also support this conclusion:

Any person wishing to apply for assistance under a plan must be given the chance to do so and, if eligible, must be furnished assistance with reasonable speed. 42 U.S.C. 602(a)(10), 1382(a)(8).

Any person whose claim for assistance is denied or whose application is not acted upon promptly must be granted an opportunity for a fair hearing. 42 U.S.C. 602(a)(4), 1382(a)(4).

Methods of administration adopted must assure proper and efficient operation of the plan. 42 U.S.C. (Supp. IV) 602(a)(5)(A), 1382(a)(5)(A).

parable method which is approved by it. 45 C.F.R. 233.20(a)(2)(iv). Finally, if the state includes special need items in its standard, it must describe those that will be recognized and the circumstances under which they will be included, and it must provide that they will be considered in the need determination for all applicants and recipients requiring them. 45 C.F.R. 233.20(a)(2)(v).

The Department's recommended methods for ascertaining need are contained in a booklet entitled "Simplified Methods for Determining Needs," copies of which are being lodged herewith. The first paragraph of the text in the body of this pamphlet states:

> Although several methods of presenting cost standards for workers to use are available to States, the method chosen must be statewide in its application. It is strongly recommended that, if at all feasible, identical cost standards also be used statewide. Any variation in cost standards by areas within a State must be justified by facts.

Similarly, the Handbook of Public Assistance Administration, IV 3120, which is still applicable as an interpretation of the regulations, states:

> The money amount may vary with difference in cost objectively determined to exist within the State.

It is thus clear that, for those items which are not treated on an individualized basis,[6] there must be a

[6] Under the "Simplified Methods for Determining Needs" the states are encouraged to have a single figure for all basic requirements, which include clothing, electricity, food, fuel, household

statewide amount for the standard of need, except insofar as differences are supported by a showing of cost differentials in the various areas of the state. As reflected in the Department's letter raising the conformity issue (App. *infra*), and as the court below found (J.S. App. 3a–8a, 13a–16a), New York has not shown that the differences in allowances under its various schedules result from demonstrable differences in the cost of the included items in the various sections of the state. Thus, the district court noted, the only relevant cost data before the state legislature when it enacted Section 131-a supported equal treatment, rather than different treatment, for New York City and its suburban counties (J.S. App. 5a); no subsequent studies had been made, no administrative recommendation had been made, and the state Commissioner, appellant here, "frankly stated that he did not know why the Legislature differentiated * * *" (J.S. App. 6a). The Department "had no evidence or study supporting" the assumptions regarding higher costs of living in the City proper on which it based its arguments below and which it repeats here (J.S. App. 7a). Plaintiffs, on the other hand, introduced extensive evidence tending to show equivalence, at least, in costs (*ibid.*). In sum, the court concluded,

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equipment, household supplies, medicine-chest supplies, personal incidentals, phone, school costs, shelter, transportation, and water. However, states may state shelter separately on an individualized basis and may also state any special needs separately. New York at present treats shelter and fuel for heating on an individualized basis.

> There is not a scintilla of evidence that the difference between the level of the schedules prescribed by the Legislature for New York City and for its surrounding counties, respectively, could be justified on the basis of a difference in cost of the essential items forming the basis of those levels. Indeed, the evidence before us is clear and undisputed that the cost of those essential items was the same for New York city as for the seven surrounding counties. [J.S. App. 13a]. * * *

These circumstances are sufficient to justify the district court's conclusion, in the proceedings for a preliminary injunction, that the plaintiffs would probably succeed in showing that the state had not complied with the requirements of the federal regulations, 45 C.F.R. 233.20(a)(1)–(2), and the underlying provisions of the Social Security Act.[1] The relief

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[1] Since appellees are seeking to enforce the *federal* standards and the present state schedules are not in conformity with those standards, we do not believe appellant's exhaustion of remedies argument is apt. In any event, the statute upon which appellants rely, App. Br. 17–22, seems to confer no right on welfare beneficiaries to initiate or appear in the state administrative procedures by which the schedules may be changed. Cf. *Rosado*, *supra*, slip op. p. 8.

Rosado, of course, makes it clear that it would be improper to require appellees to wait upon conclusion of the federal-state negotiations for resolution of the conformity issue they have raised. *Ibid.* As this Court intimated, the practical consequences of the Secretary's initiating action to cut off funds are so extreme that even the threat of such an action cannot be made lightly; he believes such pressures are not to be exerted except as a last resort. In view of the negotiations which must precede them, and the delays made inevitable by the multitude of state plan amendments and administrative matters which must be considered each year, speedy resolution of such issues within the federal administrative process is not to be expected.

granted neither precludes the state from making such showings nor interferes with the proper operation of the state statute; it precludes enforcement of Section 131–a and the schedules under it only to the extent that those are "other than according to objective, non-discriminatory standards based upon the cost of the needs of such recipients" (J.S. App. 20a).[8] As we have shown, only in such circumstances could it be in conformity with the federal act.

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[8] While this Court held in *Rosado*, slip op. 23, that the appropriate relief would be to afford the state the opportunity for prompt compliance or else compulsory loss of federal funds, we assume it did not repudiate the possibility of simple invalidation of offending state laws or regulations—the relief afforded in *King*, *supra*—where the circumstances permit. Offending rules frequently will be severable from the plan as a whole, and their financial consequences slight. Most states, like New York, have express statutory provisions indicating that the administrator of a federally funded public assistance program is to do whatever may be necessary to comply with the federal standards—including, in some cases, the invalidation of conflicting state rules. See Ala. Code 55–180(1), (2); Ariz. Rev. Stat. 46–311; Ark. Stat. 83–109(9), –109(17), –128.2; Cal. Welfare and Inst. Code 11003; Colo. Rev. Stat. 16–2–3(1)(e), 101–1–2(4), 119–3–1, –6–4(5), –9–2(1)(e); sec. 16, ch. 43, Sess. Laws Colo. 1968; Conn. Gen. Stat. 17–11; Del. Code 31–522(2),(6), 2308; Fla. Stat. 409.045(11); Ga. Code 99–2915; Hawaii Rev. Stat. 20–346–29, –346–52, –346–53, –347–5; Idaho Code 56–203(b); Ill. Code 23–12–4.5; Ind. Code 52–1113, –1113a; Ia. Code 234.6.2; Kansas Stat. 39–708; La. Rev. Stat. 46:52(6); Me. Rev. Stat. 22–10; Md. Code 88A–68(d); Mass. Gen. Laws 18–10, 800–10; Mich. Stat. 16.410; Minn. Stat. 256.01(5); Miss. Code 7174(e), 7238, 7252; Mo. Stat. 207.020(6); Mont. Rev. Code 71–204, –205, –403, –503(f), –602(f); Nev. Rev. Stat. 422.260; N.H. Rev. Stat. 126A–34, 167–24; N.J. Stat. 44:7–42, –45, 44:8–111(b), 44:10–3; N. Mex. Stat. 13–1–43, –28.7; N.Y. Social Welfare Law 320(1), 358(1), 363–a(1); N.C. Gen. Stat. 108–4(6); N.D. Code 50–24–02.1; Ohio Rev. Code 5101.51, 5103.07, 5105.11, 5106.08, 5107.02; Okla. Stat.

CONCLUSION

The judgment of the three-judge district court should be affirmed, and the case remanded for appropriate further proceedings.

Respectfully submitted.

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APRIL 1970.

56:177; Ore. Rev. Stat. 413.230; Pa. Stat. 62–201, –410, –451, –501; R.I. Gen. Laws 40–9–26; S.C. Code 71–12; S.D. Code 55–3802(5); Tenn. Code 814–206; Vernon's Ann. Civ. Stat. (Tex.), Art. 695c, sec. 4(12); Utah Code 55–15–10(2), –11(2), –23, 63–35–8; Vt. Stat. 33–2504; Va. Code 63.1–98; Wash., Laws of 1970, ch. 18–66; W. Va. Code 9–5–6a; Wisc. Stat. 3–16.54, 6–46.206; Wyo. Stat. 42–38(2),(3), –65, –70(e),(f) (The District of Columbia, Alaska, and Nebraska appear to lack such provisions). These directives are given with varying degrees of specificity, and in some circumstances are restricted to state regulations or orders rather than statutes in their operation. Even apart from this Court's holding in *King*, 392 U.S. at 333 and n. 34 (see also *Bossier Parish School Board* v. *Lemon*, 370 F.2d 847 (C.A. 5); *Shepheard* v. *Godwin*, 280 F. Supp. 869, 875 (E.D.Va.); *United States* v. *Frazer*, 297 F. Supp. 319, 322–323 (M.D.Ala.)), the existence of such a directive, where applicable, plainly warrants relief in the form of a declaration that an offending state rule is invalid and cannot be enforced. In such a case, the intermediate step of directing the non-payment of federal funds unless there were compliance would not be required.

APPENDIX

NOVEMBER 10, 1969.

Re: Submittal No. S–33–69

Mr. GEORGE K. WYMAN,
Commissioner,
New York State Department of Social Services,
1450 Western Avenue,
Albany, New York 12203

DEAR MR. WYMAN: The schedules of monthly grants and allowances set forth in the above raise a question as to whether there is provision in the New York State plan for use of a Statewide standard in determining need and payments with any variation in amounts for localities based on local differences in the cost of the items in the standard. (P.R. 20–7).

In this regard, we do not question that section 131–a(4) of the Social Services law would authorize a method of operation which is consistent with statewideness requirements. However, there must be assurance that in implementing such provision, you will undertake to maintain the proper relationship to local costs and to exercise your power to promulgate revised schedules in any case in which you determine such revision is called for, i.e., that such action is not dependent on a request or application therefor by local authorities.

The regulations which you have promulgated establish four schedules of monthly grants and allowances as opposed to the former three schedules. The additional schedule results from splitting districts which were previously included in one class; New York City is now treated separately from the counties of Dutchess, Greene, Monroe, Nassau, Suffolk, Ulster and Westchester. Grants in the latter counties will now be

approximately $4.50 lower per person than in New York City. The fact that all these counties were previously classed together with New York City would itself constitute some evidence that you have previously found the cost of the items contained in the standard to be virtually the same in all these areas, and would therefore indicate the need for specific supporting data as to the basis for this particular differentiation.

In addition, analysis of the schedules as against the pre-added monthly allowances previously payable to families in which the oldest child was ten or eleven shows a much higher increase for New York City than for any other district. In this connection, it is noted that while the previous difference between SA–1 and SA–3 schedules for the highest and lowest cost districts amounted usually to between $6. and $8. in comparable family units, the difference now ranges from $15. in a 2-person family to $39. in a family of seven. Also, while the previous schedules provided a uniform figure of $32. for additional persons, the new schedules provide $43. in New York City and $37. in every other district.

In your letter of June 2, 1969, you indicate that the differentiation between New York City and the rest of the State is based upon "its size and complexity, resulting in special requirements for transportation to use available services." It is difficult to understand how transportation costs could account for the differentiation in grant levels. Moreover, such differentiation does not appear to be supported by the most recent information (Autumn 1968) from the Bureau of Labor Statistics on living costs within the State, e.g., such costs in Buffalo as compared to New York City.

In summary, the State standard must represent items of need to be made available to all recipients statewide. Differences in money amounts, if they exist, must result from demonstrable differences in the cost of these items in various sections of the State. Given the materials submitted to date, we are unable to find that there is in effect a statewide standard being uniformly applied throughout the State. We will, of course, give full consideration to any other information or comments which you may wish to submit.

We would appreciate as prompt a response as possible, whether in the form of a written reply or by way of a meeting with your staff.

Sincerely yours,

JAMES CALLISON,
Regional Commissioner.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

DOCKET NO. 896

GEORGE K. WYMAN, as Commissioner of the Department of Social Services of the State of New York, and the DEPARTMENT OF SOCIAL SERVICES OF THE STATE OF NEW YORK,
Defendants-Appellants,

v.

EDNA ROTHSTEIN, SYLVIA MILLER, HENRIETTA BATSON, CATHERINE JONES, and DOLORES HARVANEK, as individuals and on behalf of all other persons similarly situated,
Plaintiffs-Appellees.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

DOCKET NO. 896

GEORGE K. WYMAN, as Commissioner of the Department of Social Services of the State of New York, and the DEPARTMENT OF SOCIAL SERVICES OF THE STATE OF NEW YORK.

Defendants-Appellants,

v.

EDNA ROTHSTEIN, SYLVIA MILLER, HENRIETTA BATSON, CATHERINE JONES, and DOLORES HARVANEK, as individuals and on behalf of all other persons similarly situated.

Plaintiffs-Appellees.

BRIEF FOR APPELLEES

The defendants below, George K. Wyman, as Commissioner of the New York State Department of Social Services and the New York State Department of Social Services, take this appeal from two interlocutory orders of a statutory three-judge Court convened in the United States District Court for the Southern District of New York, (Hays, C.J., Mansfield, D.J., and Motley, D.J.). At issue is the disparity between public assistance standards of need for New York City residents and those for residents of seven surrounding counties. The first order dated September 12, 1969 granted preliminary relief to the original class plaintiffs, recipients of Aid to the Aged, Aid to the Blind and Aid to the Disabled (hereinafter "AABD" or "adult categories") and enjoined, preliminarily, the appellants from promulgating

schedules of grants thereunder "other than according to objective non-discriminatory standards based on the costs of needs of such recipients". The second order permitted the intervention of Nassau County recipients of Aid to Dependent Children (hereinafter "AFDC" or "children's category") and extended the same preliminary relief to that class of recipients.

Trial was originally scheduled for October 6, 1969, but was ordered held in abeyance on consent of all parties, pending the Court's determination in this appeal.

OPINIONS BELOW

The opinion of the District Court Judge convening the statutory three-judge Court is unreported but is set forth in the appendix at pages 35-36.

The unanimous opinion of the statutory three-judge Court granting preliminary relief to the original AABD plaintiffs is reported at 303 F.Supp. 339 (SDNY 1969) and appears in the appendix at pages 101-124. The application for intervention and preliminary relief by the AFDC recipients, being made after the decision was rendered as to the AABD recipients, was granted by the three-judge panel without written opinion.

JURISDICTION

The decision of the three-judge District Court granting the appellees' motion for preliminary relief and denying the appellants' motion for summary judgment was entered on August 4, 1969. The first order granting preliminary relief to the AABD recipients was issued on September 12, 1969 and the Notice of Appeal therefrom was served and filed on October 10, 1969. The second order which granted the application of appellees Jones and Harvanek, on behalf of AFDC plaintiffs for leave to intervene and for preliminary relief, was issued on October 22, 1969 and the Notice of Appeal therefrom was served and filed on October 24, 1969.

The appellants' jurisdictional statement was filed on November 29, 1969 and probable jurisdiction was noted on February 24, 1970.

The jurisdiction of this Court is conferred by 28 USC § 1253 which provides for direct appeals to the United States Supreme Court from the decisions of statutory three-judge District Courts granting or denying preliminary relief.

CONSTITUTIONAL PROVISION, STATUTES AND REGULATIONS INVOLVED.

I. The Fourteenth Amendment to the Constitution of the United States provides, in pertinent part:

> "No state shall * * * deny to any person within its jurisdiction the equal protection of its laws."

II. 42 USC § 302(a)(1), § 602(a)(1), § 1202(a)(1), § 1352 (a)(1), and § 1382(a)(1) contain an identical provision for each of the federally reimbursed categories of assistance, which are, respectively, Old Age Assistance, Aid to Dependent Children, Aid to the Blind, Aid to Permanently and Totally Disabled, and a combined program of Aid to the Aged, Blind or Disabled and Medical Assistance to the Aged. The provision is as follows:

> "A state plan . . . must . . . provide that it shall be in effect in all political subdivisions of the state, and, if administered by them, be mandatory upon them."

III. Regulations and requirements promulgated by the United States Department of Health, Education and Welfare at issue in this case are:

1. *Handbook of Public Assistance Administration*, United States Department of Health, Education and Welfare, Part II, § 4300 provides, in pertinent part:

> "The purpose of the requirements relating to statewide operation is to assure that the public assistance program in which there is federal financial participa-

tion will be in effect throughout the state; that local offices will be available where persons can apply for assistance and services; that the benefits of the programs will be equally available to all eligible persons; and that state policies, standards and methods will apply equally to persons in like situations wherever they may live.

"Where the program is administered by political subdivisions under state supervision, the state agency is responsible for assuring that the state program and state rules and regulations are in effect in all political subdivisions. This means that the specific eligibility factors for each assistance program, including resources and standards of need, and any additional eligibility factors included in the approved state plan are uniformly applied in areas, offices or political subdivisions."

2. 45 CFR § 233.20(a) provides in pertinent part:

(A State Public Assistance Plan Shall)

"1. General. Provide that the determination of need and amount of assistance for all applicants and recipients will be made on an objective and equaitable basis . . ."

"2. Standards of Assistance.
(i) Specify a statewide standard expressed in money amounts, to be used in determining (a) the need of applicants and recipients and (b) the amount of the assistance payment."

* * *

"(iii) Provide that the standard will be uniformly applied throughout the State."

IV. New York Social Services Law § 131-a[1] in pertinent part provides:

"1. Any inconsistent provision of this chapter or other law notwithstanding, social services officials shall

[1]Section 131-a was enacted on March 31, 1969 to take effect on July 1, 1969 by L. 1969, ch. 184. Subdivision 4 was added to §131-a by L. 1969, ch. 411, enacted May 2, 1969, effective July 1, 1969.

provide home relief, veteran assistance, old age assistance, assistance to the blind, aid to the disabled and aid to dependent children, to eligible needy persons who constitute or are members of a family household, in monthly or semi-monthly allowances or grants in accordance with standards established by the regulations of the department, but not in excess of the schedules included in this section, less any available income or resources which are not required to be disregarded by other provisions of this chapter. Such schedules shall be deemed to make adequate provision for all items of need in accordance with the provisions of section one hundred thirty-one, exclusive of shelter and fuel for heating, for which two items additional provision shall be made by the social services districts in accordance with the regulations of the department.

"2. The following schedule of maximum monthly grants and allowances shall be applicable to the social services district of the city of New York:

Number of Persons in Household

One	Two	Three	Four	Five	Six	Seven
$70	$116	$162	$208	$254	$297	$340

For each additional eligible needy person in the household there shall be an additional allowance of forty-three dollars monthly.

"3. The following schedule of maximum monthly grants and allowances shall be applicable to all other social services districts:

Number of Persons in Household

One	Two	Three	Four	Five	Six	Seven
$60	$101	$142	$183	$225	$257	$290

For each additional eligible needy person in the household there shall be an additional allowance of thirty-three dollars monthly.

"4. Provided it accords with federal requirements, the regulations of the department shall provide that the commissioner, with respect to any social services

district to which subdivision three applies, may promulgate a schedule of monthly grants and allowances for greater or lesser amounts than established by the regulations of the department applicable to such district, but not to exceed the maximums prescribed by subdivision two, for all items of need exclusive of shelter and fuel for heating, if it is established that in such district the total cost of the items included in the schedule applicable to such district actually is more or less, as the case may be, than the cost thereof reflected in such schedule. A social services official may, with the approval of the appropriate local legislative body, make application to the department for the promulgation of a schedule pursuant to this subdivision."

McKinney's Session Laws 1969, Ch. 184[2] provides:

"Section 1. Legislative findings and purpose. The spiraling rise of public assistance rolls and the expenditures therefor, despite a high level of general prosperity and an unprecedented high rate of employment, have become matters of primary social and economic concern to the people of the state of New York. The escalation continues, both in numbers of people requesting assistance and in the costs thereof, despite predicted continuance of general prosperity and high employment.

The present procedure for establishing the monthly grant and allowance, based upon various factors, has been criticized as arbitrary, confusing, complicated and time-consuming for social services personnel and allegedly resulting in a lack of uniformity and uneven treatment of the recipients of public assistance throughout the state.

A uniform schedule of monthly grants and allowances will promote greater uniformity and equality of treatment of the recipients of public assistance, meet the needs of our less fortunate citizens and simplify and reduce the administrative detail. This

[2]Preamble to Social Services Law §131-a

will release case workers for the more important task of providing casework services to restore recipients to the dignity of self-sufficiency.

The legislature therefore finds and declares that it is necessary and in the best interests of the people of the state to establish a schedule of maximum monthly grants and allowances of public assistance for the city of New York social services district and a schedule of maximum monthly grants and allowances of public assistance for all other local social services districts in the state, based upon the costs of delivering the needs of public assistance recipients in the respective social services districts of the state, and to make other remedial changes provided for in this chapter."

V. 18 NYCRR § 352.4(a)(2), dated 6/30/69, provides in pertinent part as follows:

"2. The monthly grants and allowances shall be as follows:

SCHEDULE SA-1

MONTHLY GRANTS AND ALLOWANCES

NEW YORK CITY

Number of Persons							Each Additional
One	Two	Three	Four	Five	Six	Seven	Person
$70	$110	$162	$208	$254	$297	$340	$43

SCHEDULE SA-2

MONTHLY GRANTS AND ALLOWANCES

COUNTIES OF Dutchess, Greene, Monroe, Nassau, Suffolk, Ulster and Westchester

Number of Persons							Each Additional
One	Two	Three	Four	Five	Six	Seven	Person
$63	$107	$149	$191	$233	$270	$307	$37

QUESTIONS PRESENTED

1. The public assistance standard of need applied to appellees, residents of New York City suburban counties, together with that applied to New York City recipients, was reduced below what the state had previously considered to be a minimally adequate level for survival; the standard of need applied to appellees was then further reduced from 7 to 16 per cent below the New York City standard, despite the uncontested fact that the cost of items essential for survival, such as food, is equally as great for appellees as for New York City recipients. Welfare officials from appellees' home counties gave uncontradicted testimony that the reduced standard of need for appellees leaves them with welfare allowances that are lower than the amount needed to obtain the bare essentials of life. In these circumstances, did the district court abuse its discretion in finding the plaintiffs-appellees would suffer irreparable harm unless the preliminary injunctions here appealed were issued?

2. Is there strong reason to believe that plaintiffs-appellees will succeed in their contention that the differentials in standard of need established under § 131-a violate the uniformity requirements of the Federal Social Security Act?

3. Should the statutory issues in this case be determined before reaching the constitutional issues?

4. Did the court below abuse its discretion in finding strong reason to believe that traditional standards of equal protection are violated by the establishment of a public assistance standard of need for New York City recipients that is significantly higher than that applied to residents of suburban counties, in light of the facts that there is no difference whatsoever in the two areas in the cost of the items of need included in the standard (with the exception of certain items the cost of which is higher in the surrounding counties), that there is no rational basis whatsoever for concluding that New York City recipients have higher "social

aspirations" than do those in surrounding counties, and that the standard of need applicable to those in surrounding counties is insufficient to obtain items needed for survival?

5. Is this case unripe for federal judicial determination?

The court below answered "no" to question 1, declined to determine question 2, answered "no" to question 3, answered "no" to question 4, and answered "no" to question 5 except for the statutory issue, to which it answered "yes."

STATEMENT OF THE CASE

The appellees are five recipients of public assistance, residing in Westchester and Nassau Counties, two suburban counties contiguous with New York City in the State of New York. They receive assistance in New York's federally supported public assistance programs Aid to the Aged, Blind and Disabled and Aid to Dependent Children.[3] As class representatives of persons receiving such categories of assistance, appellees brought this action challenging § 131-a of the Social Services Law and the statewide administrative regulation[4] promulgated by the appellant Wyman which created a wholly arbitrary and unjustifiable difference in

[3] The federal legislation regarding these categories of assistance appears in 42 USC §301 *et seq.* (Old Age Assistance) §601 *et seq.* (Aid to Families with Dependent Children) §1201 *et seq.* (Aid to the Blind) and §1351 *et seq.* (Aid to Totally Disabled and §1382 (Combined Program for Adult Categories). New York has a combined program pursuant to §1382 for the adult categories. New York Social Services Law §350 *et seq.* The Federal regulations specifying guidelines to be followed in the state and local programs which are federally reimbursed are found in 45 CFR §233.20, 34 Fed. Reg. 1394, and Handbook of Public Assistance, Pt. II §4000 *et seq.*

Public Assistance in New York State is administered according to the provisions of the Social Services Law and Title 18 of the New York Code Rules and Regulations.

[4] Ch. 184 L. 1969 (March 31, 1969); 411 L. 1969 (May 2, 1969); 18 NYCRR §352.4 (June 30, 1969).

the level of grants which appellees receive as compared to that which identical families in New York City receive.[5] The action was instituted pursuant to 42 USC 1983 and 1988, 28 USC § 1331, 1337, 1343, 2201 and 2202. The appellees alleged that the schedule for the lowered grants violated the Social Security Act's requirements of statewide uniformity in public assistance grants as contained in 42 USC § 602(a)(1), § 1382(a)(1), and in the regulations promulgated thereunder 45 CFR § 233.20(a)(1)(2), Department Health, Education and Welfare Handbook of Public Assistance Administration Part II, § 4300. The discriminatory schedule was also attacked as violative of the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution.

A. *The Enactment of § 131-a and the Promulgation by Appellant Wyman of a Schedule of Public Assistance Grants Which Provide One Level of Benefits to Recipients in New York City and a Lower Level to Recipients in Suburban Counties in the New York Metropolitan Area*

Prior to October 1, 1968, grants for public assistance recipients in New York State were divided into three parts a grant to cover the cost of rent, a grant to cover the cost of certain recurrent needs that all families share, and special grants to cover the costs of special needs individual families may have. *Rosado v Wyman* U.S. , (1970) 38 USLW 4266. The grant for recurrent needs included money for the following items: Food, clothing, personal incidentals, household supplies, school expenses, utilities, laundry and sales taxes. Deposition of Appellant Wyman, Appendix, p. 47. (Hereafter Appendix page numbers are cited "(A.)"). It did not include money for rent which was granted on the basis of the individual

[5] It should be noted "New York City recipients" are not merely those living in the Borough of Manhattan, but include recipients residing in outlying areas such as Queens, Staten Island, Brooklyn, and Bronx.

family's actual rent, nor money for transportation costs which either were not paid for or were covered in the grant based on the individual family's special needs nor money for cultural and recreational events which was not granted at all. Id. (A. 61)

The grant level for basic recurring needs was established by pricing the individual items the grant is intended to cover. The last time such a pricing was conducted was in May 1968. Id. (A. 50, 55). At that time and on the basis of the pricing study the state welfare agency determined to continue the division of New York State into three areas labelled SA-1, SA-2 and SA-3. New York City, Nassau, Westchester and five other suburban counties were placed together in the SA-1 category and needy families in these areas received identical basic monthly grants regardless of whether they lived in Westchester, Nassau or New York City. This was consistent with the practice of the State ever since the outset of statewide administration of welfare grant levels in New York State.[6]

In Setting these grant levels the sole difference between the various areas of the state was differing utility cost, which was the same in Nassau, Westchester and New York City (A. 59). All other items were found to cost approximately the same throughout the State and hence recipients in areas where utility costs were the same were treated identically. This is made clear in reading the deposition of the appellant Wyman in which he explains the differences in grant levels as follows:

> Q. And were those differences based on a desire to give some people more money than other people?
> A. On the basis of the cost of living in those areas.

[6] Prior to 1951, county welfare administration set the level of recipient grants. This procedure was the source of some dispute between H.E.W. and New York because of the resulting lack of uniformity within the state. See Altmeyer, *The Formative Years of the Social Security Act*, 192 (1966).

a variation due to the utilities cost between these geographic sections of the state.

Q. The differences between them were entirely due to utilities costs? A. Yes.

[4] Q. What is embraced by utilities? A. Electricity, water, gas, if that is provided, for cooking purposes, things normally considered utilities.

Q. And hence they reflected an object of giving people the exact same amount of purchasing power? A. The content would be the same, yes. (A. 41-42)

Later in his deposition, appellant Wyman testified that the cost difference for example of food between New York City and the most rural upstate county "is significant in the overall." (A. 82)

In addition to Commissioner Wyman's testimony, evidence on the comparable cost of items between Nassau and New York City is contained in the affidavit submitted to the District Court by Joseph S. Barbaro, Commissioner of the Nassau County Department of Social Services (A. 168) and the exhibit he annexed to his affidavit showing the cost of special need items in New York City and Nassau. (A. 175)

Commissioner Barbaro states:

"Based upon professional and personal experience, your deponent verily believes that the cost of maintaining minimally adequate standards of living in Nassau County is at least as high as those in New York City, and certain costs, such as transportation, are even higher in Nassau County. The New York State Board of Social Welfare has for many years treated New York City and Nassau County the same in its schedule of grants, SA-1.

"Attached thereto are various proofs, prepared with the County Attorney of Nassau County and the Planning Commission of Nassau County which were previously submitted to this Court in a related case which fully documents the lack of foundation for

the findings that the cost of living in Nassau County is lower than that in New York City.

"That the differential in standards of assistance as contained in § 131-a appears to me to be based on something other than a consideration of need." (A. 169)

Moreover, the United States Bureau of Labor Statistics in preparing its statistics on the cost of living includes for the area of New York City the surrounding counties. Id. (A. 82). In other words, the evidence below, fairly conclusively demonstrates that there is no difference in the cost of basic need items within the Greater New York Metropolitan area. The sole difference, which the court below noted (303 F.Supp. at 344, footnote 4) (A. 122) is that household furnishings appear to be more expensive in the suburban areas.

On October 1, 1968, New York State instituted a demonstration project in New York City to test the principle of the so-called flat grant. This demonstration project did not affect the grant for either rent or recurrent basic needs. However, it did replace the special grants in New York City with a $25.00 per person quarterly cyclical grant. The $25.00 representing an averaging of the costs of the special needs previously met on an individual basis.[7] *Rosado v. Wyman, supra*, 38 U.S.L.W. 4272.

[7] The reason for testing this averaging system in New York City was explained by George W. Chesbro, First Deputy Commissioner of Social Services of the State of New York in an affidavit submitted in *Rosado v. Wyman*, supra. Chesbro stated that the special grant "received by New York City welfare recipients more than double the average received in rural counties in many categories of public assistance." He explained, "This results from the wide variety of practices of local districts regarding special grants, the greater availability of information in New York City, greater accessibility of welfare offices, the recipients' attitude toward welfare and their degree of organization, their resultant sophistication and willingness to take advantage of opportunities within the system." *Rosado v. Wyman*, supra. (Appendix p. 98.)

Thus, on July 1, 1969, the effective date of § 131-a, the situation was that throughout the state public assistance recipients received grants for their rent, and for their recurrent basic needs.

The cost of meeting these basic needs was identical throughout the state except for utilities which were found to be the same in New York City, Nassau, Westchester and five other suburban counties. Finally, itemized special needs were met throughout the state except in New York City where instead, on a test basis, a cyclical payment representing the cost of the average special needs was made.

On March 31, 1969, the New York State Legislature enacted § 131-a of the Social Services Law. Among other things this law stripped the Commissioner of Social Services of his power to set grant levels, established new grant levels for recurrent basic needs, and abolished special grants.[8] Very shortly after the enactment of § 131-a, *Rosado v. Wyman*, supra, was brought challenging the validity of the statutes under 402(a)(23) and also attacking on statutory and equal protection grounds the lesser payments for AFDC recipients in Nassau County than those allowed in New York City. *Rosado v. Wyman*, 38 USLW 4266. This apparently led the Legislature to amend § 131-a to give the defendant Commissioner of Social Services the power to "promulgate a schedule of monthly grants and allowances for greater or lesser amounts than established," but not to exceed the level provided for recipients in New York City "if it is established that in such district the total cost of the items included in the schedule applicable to such district actually is more or less, as the case may be, than the cost thereof reflected in such schedule." Consequently, the three-judge court remanded the "matter" to the original single district judge "until there [had] been an oppor-

[8] In *Rosado v. Wyman*, ___ U.S. ___ (1970), 38 U.S.L.W. 4266, 4271, the United States Supreme Court upheld the District Court's finding that "special grants were not included in these computations" referring to the new grant levels.

tunity for action by state officials." 304 F.Supp. 1354, 1356.

Appellant Wyman, without holding a hearing, without conducting a study and having before him only the same pricing studies which he used to classify New York City, Westchester and Nassau together in 1968, promulgated a schedule providing different levels of benefits to recipients in Westchester and Nassau from that received by identical recipients in New York City. The schedule promulgated by Wyman provided grants at the following levels:

Number of Persons in Household	*New York City*	*Nassau, Westchester and Five Other Suburban Counties*	*Percent Disparity*
ONE	$ 70	$ 65	7.7
TWO	116	107	8.4
THREE	162	149	8.7
FOUR	208	191	8.8
FIVE	254	233	9.0
SIX	297	270	10.0
SEVEN	340	307	10.7
Each Additional Person	43	37	16.2

At his deposition, appellant Wyman was asked what it was that accounted for the differences of 10% in the basic recurrent grant between New York City families and suburban families. He replied:

> "The essential difference is in the complexities of urban living in the City of New York, the necessity of provision of transportation items on a regular basis, the fact that there are social opportunities, readily available transportation, community center facilities, and clinic facilities in New York City that are not available in other areas of the state to the same extent, certainly not the components of the urban living requirements." (A. 59)

These items which appellant Wyman testified accounted for the increased grant in New York City are items that were never included within the components of the basic recurring grant. That grant included only items of basic necessity, the items listed on page 9, supra. These items were not even included in the list of special grants. (A. 60) In other words, the list of the components contained within the recurring grant for basic needs was arbitrarily and suddenly expended only for New York City but not for the rest of the metropolitan area and not for any other cities or place within the state.

Wyman testified that the Legislature did not inform him in any manner that it was adding these items into the New York City budget. (A. 60) He testified he made no study of the relative availability and usage of museums, clinics, community centers, religious centers, cultural institutions in New York City, in Westchester County, in Nassau County and so on. (A. 63) No budgetary studies were made to determine the cost of these items. (A. 60) Defendant Wyman testified that he was unaware of the usage of these facilities by the city's poor. (A. 81) He testified no study was made of the different life styles in the city as compared to outside the city. (A. 81) He testified that transportation costs were less expensive in New York City. (A. 76). He further testified that he was unaware to the extent cultural facilities existed in Nassau and Westchester counties, but that to the extent they existed he assumed people would use them "as in New York City." (A. 66) He testified that he assumed that there were beaches and parks in Nassau and Westchester and that people used them and in addition that it cost more to do so. (A. 66) Finally he was asked if he took "into account the need for . . . visiting cultural facilities in these [suburban] communities" and he answered; "No, not to the same extent." (A. 76) Nonetheless, he promulgated the schedule of benefits above giving lower payments to appellees than to identically situated persons in New York City.

Further, appellant Wyman testified that the Department never told New York City recipients the purpose of this bonus they receive. (A. 63) Moreover, he testified it would not be a misuse of the money to use it to buy those items previously supplied by special grants. (A. 61, 63) In other words, New York City recipients can use this extra amount to make up for part of the special grants they lost, but other recipients outside the city who also lost those same special grants will not be able to do so.

B. *Plaintiff-Appellees*

Individually, the appellees are disadvantaged and handicapped persons living marginally on public assistance grants in suburban counties in the New York metropolitan area.

Appellee Rothstein is over 65 years of age. Prior to the new law she received special grants for medical out-patient hospital care with special needs grants to meet old-age expenses, a telephone for emergencies, transportation for shopping and hospital trips and extra size clothing. (A. 28) The new legislation eliminated assistance for these special needs and reduced her monthly grant from $85.90 to $65.00, $5.00 below that for a New York City recipient.

Appellee Batson is 68 years old and is totally blind. She has additional expenses related to a medically prescribed diet, a telephone for emergencies, food for her seeing-eye dog, and aid in reading. (A. 31) Mrs. Batson lost all special allowances for these needs due to the enactment of § 131-a, and despite a slight increase in her rent, her total grant was reduced by almost $100.00. (A. 99)

Appellee Miller is crippled and confined to a wheelchair, requiring the services of a homemaker, the aid of a telephone, transportation, and a medically prescribed diet. (A. 29) Her allowance was cut drastically from $122 to $65, 7.7% below a similarly situated recipient in New York City.

The remaining two appellees, Dolores Harvanek and Catherine Jones, intervened on behalf of themselves and

other recipients in the Aid to Dependent Children program. Mrs. Jones, a mother of three adolescent boys, previously received a grant of $239.75, including allowances for school lunches and a telephone, plus special periodic grants for furniture and clothing. Her grant was reduced by $38 to $191 per month, which is $17 (9%) below the amount accorded to a family of four in New York City. (A. 139) Mrs. Harvanek has six children, ages 17 to 8, and after the effective date of the law, her grant was reduced by $69 per month, plus the loss of all special clothing and furniture allowances, to a level of $43 (11%) less than a similarly situated family in New York City. (A. 40)

To each of the appellees and members of their classes, who received a bare 90¢ per day per person for food, the discriminatory differential represented certain basic needed items such as a seeing-eye dog, food, and minimal clothing.

C. *Three Judge Court Unanimous Opinion*

The lower Court issued a unanimous twenty-eight page opinion written by Judge Mansfield finding that no rational basis had been shown for the lower grants made to suburban recipients and, accordingly, that the appellees had demonstrated a likelihood of success on their claim that the discriminatory schedule violated the Equal Protection clause of the Fourteenth Amendment. The Court also considered the appellees' federal statutory claim that the lower allowances violated the Social Security Act's requirements for statewide uniformity of grants, but noted that since H.E.W. seemed to be reviewing New York's compliance on this issue with federal law, the Court would "defer determination as to the requirements of the Social Security Act in anticipation of a ruling by H.E.W." 303 F.Supp. 351 (A. 119).[9]

[9]While H.E.W. has taken no action to date by way of a conformity hearing, it has informed Commissioner Wyman, through a letter dated November 10, 1969, that New York has failed to justify the lower allowances to suburban recipients and that therefore H.E.W. was "un-

The Court's decision was a comprehensive analysis of developments and factors in the public assistance field in New York during 1969 which resulted in the undeniably lower grants for suburban counties. The opinion noted initially that considerable evidence existed that the cost of meeting recipients' needs in New York City was the same as that in surrounding counties, as indicated by prior schedules making the same grant to both areas, the most recent (1968) cost study by Wyman upon which prior equal schedules were based, the 1968 survey of costs by the Department of Labor's Bureau of Labor Statistics which grouped New York City and surrounding counties in the same classification. 303 F Supp 342, 343 (A 103). Moreover, the Court weighed affidavits submitted by the Commissioners of the Nassau County Department of Social Services and the Director of the Nassau County Planning Commission stating flatly that costs of living and costs of transportation are as high or higher in Nassau County as they are in New York City, as well as the extensive price lists prepared by local welfare agencies demonstrating comparable or higher costs of clothing and furniture in suburban counties. 303 F Supp 344, fn 4, 34, fn 5, 348, fn 9 (A 122-124).

The Court emphasized that the legislature itself, while expressing concern for equal treatment in its preamble to § 131-a, did just the opposite in its schedules for suburban recipients. The Court, while noting the undisputed fact that no cost studies had been undertaken which indicated a higher cost of living in New York City, nonetheless meticulously examined each reason given by the appellant for the favored class of New York City recipients, including the "social cost of living in the urban center", "higher level of aspiration and expectations" and greater needs for transportation to beaches and recreational facilities. The Court

able to find that there is in effect a statewide standard being uniformly applied throughout the State." (A 172). No further action has been taken by either HEW or the State Commissioner.

noted that the appellant Commissioner admitted that no study existed to support his assumption of, for example, greater availability of cultural, medical and religious centers in New York City [redacted] 344 (A 107). Moreover, noted the Court, the Legislature had before it no evidence whatever [redacted] higher cost of living. The Court concluded:

> "There is not a scintilla of evidence that the difference between the level of the schedules prescribed by the Legislature for New York City and for its surrounding counties, respectively, could be justified on the basis of a difference in cost of the essential items forming the base of those levels. Indeed, the evidence before us is clear and undisputed that the cost of those essential items was the same for New York City as for the seven surrounding counties. In the face of such convincing and uncontroverted evidence, we cannot, therefore, assume that the Legislature founded the statutory disparity upon a geographical variation in cost of the component items." 303 F. Supp. 347 (A 113).

The Court found that the record disclosed no rational for the discrimination against the appellees except for that of saving funds, specifically found to be an impermissible basis for invidious discrimination in *Shapiro v. Thompson*, 394 U.S. 618 (1969). Logically proceeding, the Court evaluated the impact of the discriminatory allowances upon the appellees:

> While this may seem minor to most people, it is of crucial importance to the appellees here, who present tragic hardship cases, some of them already the victims of severe cutbacks in other forms of special aid formerly received (e.g. telephone service for medicine and groceries, food for seeing dogs, transportation allowances to hospitals, special diets for diabetics, readers for the blind, hearing makers for those confined to wheelchairs, etc.) [redacted] for an indigent person now receiving approximately fifty per day, for food an additional [redacted] per day

hardly be described as *de minimus*. Access to such bare necessities of life on a non-discriminatory basis involves a critical interest for those whose life depends on it." 303 F. Supp. 348 (A. 114).

Finally, noting that the evidence submitted indicated a likelihood of success on the plaintiffs' equal protection claim due to the appellant Wyman's failure to justify in any way the differential, the Court found that there was a threat of imminent harm to the appellees by way of losing food emergency needs and disability aids due to the significantly lower allowances, and granted a preliminary injunction.

II. *Relief Requested and Subsequent Events*

After this, Judge Court issued an order dated September 12, 1969 preliminarily enjoining the defendants from enforcing § 131-a [illegible] or from promulgating schedules of grants and allowances of public assistance or making payment thereof to such recipients other than according to objective, non-discriminatory standards based upon the cost of the needs of such recipients. (A. 126). In compliance with this order, on September 25, 1969 appellant Wyman ordered that the lowest assistance paid to AABD recipients in any [illegible] counties be raised to the New York City level, effective immediately. The aged, blind and disabled recipients in these counties were personally notified of the increased grants and since October 1969 have received public assistance on a par with New York City recipients.

[illegible] the district court set October 6, 1969 as the trial date. However, appellants notified appellees and the court before that they would prefer to appeal the preliminary injunction. The appellants and appellees agreed to advance the trial until after determination of this appeal.

The District Court [illegible] and therefore moved to [illegible] on behalf of themselves and all other recipients

On October 10, 1969, notice of appeal to this Court was filed.

Appellants subsequently moved by order to show cause before the lower Court for a stay of the two Court orders. After hearing oral argument on the application, the three judge panel unanimously denied the stay. On November 5, 1969, appellant Wyman ordered all suburban county welfare departments to provide AFDC and Home Relief recipients[11] who were not represented in the action with assistance grants equal to the allowances received by counterpart recipients in New York City.

On November 28, 1969, appellants filed their jurisdictional statement with an application for a stay of the two preliminary injunctions. By decision dated December 10, 1969, Mr. Justice Harlan denied the application for a stay of the District Court orders. Appellees on December 31, 1969, submitted to this Court a motion to affirm the decision of the three judge district court and for leave to proceed *in forma pauperis*.

On February 24, 1970, this Court noted probable jurisdiction, granted appellees' motion to proceed *in forma pauperis* and informally directed that there be an accelerated appeal with argument to be held during April 1970.

of Aid to Dependent Children residing in suburban counties also moving that the preliminary injunctive relief be extended to them and their classes (A 13), except (On October 10, 1969, after hearing arguments of both sides and considering the motion papers submitted including an affidavit in support of the intervening children by the Nassau County Commissioner of Social Services (A 211), the court unanimously granted leave to intervene to the AFDC recipients and extended to them the preliminary relief granted previously to the AABD recipients. On October 22, 1969, the Court signed an order embodying its oral decision of October 10, 1969 directing that the same ... [illegible] ... relief be applied to them as well.

[11] The only general category in New York State which is not [illegible] relief reimbursed.

In the [illegible] development shortly after the receipt of the H E W letter the State Board of Social Welfare recommended to Governor Rockefeller along with [illegible] that welfare grants be made uniform throughout the State of New York (New York Times, vol. CXIX, No. 40,884, November 24, 1969, P. 1, col. 2). On January 5, 1970 Governor Rockefeller in his message to the Legislature noted that "The Board has also recommended the establishment of statewide standards of public assistance." (Governor Rockefeller Message to the Legislature, January 5, 1970, p. 6.) And on February 9, 1970 the Governor submitted a budget bill to the State Senate (S. 7551) which would have established statewide uniformity in welfare grants.

SUMMARY OF ARGUMENT

There can be little reasonable doubt about the grave and irreparable harm that appellees would have suffered in this case without the preliminary injunctions. As the courts below found, their standards of need had been cut below the levels needed for the bare essentials of living. Their new standards provided from seven to sixteen percent less

than those for New York City recipients, even though the costs of essential needs are the same where appellees live as in New York City, except for certain items, such as household furnishings, which are more expensive where appellees live. Neither the standards for New York City nor the standards for appellees' counties provide for anything above the bare essentials, certainly not for what appellants have deemed the "higher social aspirations," such as money for carfare to cultural centers. Needed special grants, such as those for extra clothing, eyeglasses, special diets, and beds to sleep on, had been eliminated. The small amounts of money made available to appellees as a result of the injunctions represented a critical factor in the very ability to live and remain healthy.

Clearly, however, in light of this Court's recent decisions in *Rosado v. Wyman*, __ U.S. __ (1970), 38 U.S.L.W. 4266, and *Dandridge v. Williams*, __ U.S. __ (1970), 38 U.S.L.W. 4277, the district court erred in not determining whether appellees would probably succeed in their contention that the differentials in standard of need promulgated under Section 131-a violated the uniformity requirements of the Social Security Act. In order to avoid unnecessary determination of constitutional questions, this Court should consider the statutory argument especially since appellees fully briefed and argued it below. If, however, this Court concludes that it should have the benefit of the district court's opinion on the statutory issues, appellees urge that the Court remand the case to the district court for immediate consideration of the statutory issues, without disturbing the preliminary injunctions in light of the harm that would otherwise befall appellees. Such a remand is unnecessary, however, and this Court can proceed to a consideration of whether there is good reason to believe appellees will succeed upon the trial of the statutory issues.

A consideration of the pertinent HEW regulations makes it clear that the differentials in question do violate the federal uniformity requirements. The regulations require that

standards of need be statewide in scope. New York standards of need are not statewide. The regulations require that any exception to statewideness be based on objective data demonstrating that the cost of meeting the needs differs in various parts of the state. These differentials in standards of need are based on no objective data whatsoever. Moreover, as appellants' own testimony and arguments make clear, they are based on a recognition of *different needs* (rather than costs) for recipients in New York City as compared to recipients in Nassau or Westchester. Such disparate treatment is clearly forbidden under the HEW regulations. Moreover, no reason whatsoever exists to believe that persons in Nassau and Westchester and elsewhere do not have similar needs (such as the need to travel to day-care centers or welfare centers). Costs for meeting such needs as were recognized for New York City residents but not for Yonkers or Nassau residents are, in fact, higher in Yonkers and Nassau than they are in New York City.

HEW concluded in November 1969 that the differentials in standards of need do not appear to meet the uniformity requirements. All of the evidence in the record compels the same conclusion by this Court. For this reason, this Court should affirm the preliminary injunctions.

Appellants erroneously argue that the court below based its decision in favor of the preliminary injunctions upon the conclusion that a special equal protection standard should govern welfare cases. The court below, however, expressly noted that the differentials in question probably violate the "traditional" standard of equal protection. Unlike *Dandridge v. Williams*, U.S. , (1970), 38 USLW 4277, there is here no minimally rational reason for the differentials. Costs in New York City and its surrounding counties are the same (except for certain important items which are more expensive in the surrounding counties). Not an iota of evidence, not a bit of common sense supports the notion that the needy of New York City's five boroughs have "higher social aspirations" for which they

should receive a larger grant than the needy of the suburban counties surrounding New York City. No reason whatsoever exists for believing that an impoverished mother in Yonkers has less need to travel to a recreation center than an impoverished mother in the Bronx or Staten Island. Travel costs are, as demonstrated in the record, higher in the surrounding counties than in New York City. The notion that Queens recipients have "higher social aspirations" than Nassau recipients is not simply lacking in objective support. It is scandalously silly and obnoxious.

Appellants' other "rationales" are equally lacking in minimum rationality. The greater number of welfare recipients in New York City has absolutely no rational connection with the standard of need for individual recipients in New York City as compared to Yonkers or Poughkeepsie. The attempt of appellants to introduce new "evidence" of higher living costs in New York City on this appeal of the interlocutory orders to this Court is entirely inappropriate. Not only is the "evidence", *e.g.* that rent control produces lower rents for New York City residents which leads to deteriorated housing questionable and irrelevant on its face, not only does it ignore the existence of rent control in various suburban communities, but, of more relevance it should not be considered by this Court. Appellants may raise such matters with the court below. A trial on the issue of permanent relief awaits them as soon as this appeal is determined.

Appellants' claim that this case is not ripe for federal judicial determination is clearly erroneous in light of this Court's recent decision in *Rosado v. Wyman*, __ U.S. __ (1970), 38 USLW 4206. This court should affirm the preliminary injunctions on the ground that the court below did not abuse its discretion in finding that appellees would suffer irreparable harm without such injunctive relief and on the ground that appellants' differentials are in probable violation of the uniformity requirements of the federal act.

ARGUMENT

POINT I

The Court Below Did Not Abuse Its Discretion In Granting the Preliminary Injunction. Irreparable Harm Would Be Suffered by Appellees Without the Injunction. The Differential Which Has Been Enjoined Clearly Violates Federal Statutory and Regulatory Requirements. The Court Below Properly Found That the Differential Probably Violates the Fourteenth Amendment Under Traditional Equal Protection Standards.

It is, of course, of great relevance that this appeal is from an injunction pendente lite. The central issue of the appeal, therefore, is whether the court below abused its discretion in granting the preliminary injunction, not whether this court would have exercised such discretion in an identical manner. *United States v. Carrick*, 298 U.S. 435, 437-438 (1936). Put another way, the issues are whether there was an appropriate basis for the district court to conclude that irreparable injury would occur to appellees without such an injunction pending trial, and whether it is reasonable to assess the likelihood of appellees' ultimate success as substantial. *Yakus v. United States*, 321 U.S. 414, 440 (1944); *Union Management Corp. v. Koppers Co.*, 360 F. 2d 190, 192 (2d Cir. 1966). As stated by this Court in *Ohio Oil Co. v. Conway*, 279 U.S. 813, 815 (1929):

> "Where the questions presented by an application for an interlocutory injunction are grave, and the injury to the moving party will be certain and irreparable if the application is denied and the final decree be in his favor, while if the injunction be granted the injury to the opposing party, even if the final decree be in his favor, will be inconsiderable or may be adequately indemnified by a bond, the injunction usually will be granted."

Below we first discuss the nature of the irreparable injury that appellees would suffer without the preliminary injunction in this case. That injury flows from the enormous impact on the bare essentials of life for appellees that appellants' "slight differential" of approximately ten percent in standard of need would wreak. Thereafter we discuss the manner in which appellants' differential clearly violates federal statutory and regulatory requirements of uniformity in standards of need under state welfare plans. The Court below failed to determine the arguments on the statutory issue because it believed that it must defer to future consideration of the issue by H.E.W. The Court erred in failing to consider the statutory violation (see *Rosado v. Wyman*, __ U.S. __ (1970), 380 U.S.L.W. 4266), and this Court should uphold the preliminary injunction upon the basis of the clear statutory violation. Alternatively, this Court might remand this case to the Court below for that Court's determination of whether the statutory allegations of appellees provide an appropriate basis for the injunction.

In Section C of this Point we demonstrate that the Court below properly found a probable violation of Traditional Equal Protection standards. The totally frivolous "reasons" advanced by appellant to the Court below lack the minimum rationality found to exist in *Williams v. Dandridge*, __ U.S. __ (1970), 380 U.S.L.W. 4277 (decided this past week). Frivolous, too, are the "justifications" raised for the first time in this case in appellants' brief to this Court. Such new "justifications", especially in light of the confusion which surrounds what they actually consist of, are appropriately raised for initial consideration before the district court and not in this appeal. Finally, in the conclusion of this Point, we examine the limited and carefully drawn nature of the preliminary injunction.

A. *The Preliminary Injunction in This Case Is Necessary To Prevent Irreparable Injury to the Appellees and Other Members of Their Class Through Deprivation of the Bare Essentials of Life*

Repeatedly, throughout their jurisdictional statement and brief to this Court, appellants have referred to the "slight differentials" involved in this case. Appellants would have this Court believe that the injury here involved is not of any great consequence but, rather, is "slight". Without doubt, this contention of appellants is at the heart of this appeal. If appellants are correct, then the injury that appellees would suffer is *de minimus* and its irreparable nature questionable. The Court below, in its opinion, carefully considered appellants' contention and, with compelling arguments, rejected it. We raise some additional and supplementary considerations regarding the severe and irreparable nature of the injury appellees would suffer without the preliminary injunction.

Initially, however, it is helpful to keep in mind certain salient background facts. These facts, have been established in the affidavits and depositions of this case, are set forth at greater length in our Statement of Facts, supra, and are precisely the kind of factual issues among others which were and are to be subject to greater proof and demonstration in the trial of this action (if such trial is ever held).

First, we deal here with a differential established not by an addition in favor of New York City welfare recipients over July 1, 1969 levels realized by both city and suburban recipients, but rather by an extra large reduction of the standards of need for suburban recipients.[13] Second, the

[13] That grants were lowered as a result of the July 1, 1969 amendments to Section 131-a was found as a fact by the Court below, 303 F. Supp. 343 (A. 106). The increase just enacted by the legislature, see p. 30, *infra*, was granted for the purpose of adjusting the July 1, 1969 levels to cost of living increases since then and, clearly, not to

essential items for survival which composed the welfare grants prior to the reductions of July 1, 1969, did not include the needs raised by appellants in the preliminary hearing and in their affidavits below as the justification for their differential (primarily, the "higher social aspirations" in New York City; see section B, *infra*). Third, as the Court below found there was "not a scintilla of evidence" presented to the Court below that the cost of essential items for survival which made up the schedule of allowance and grant, differ in New York City and the surrounding suburban counties except insofar as costs were actually higher for certain items in the suburban counties. 303 F. Supp. at 147 and at 144, footnote 4.

Thus the differential between New York City and its surrounding suburban counties is one created by reductions in grants for essential items to the people in the suburban counties. How slight is the reduction in essential items measured in dollar terms, under the Commissioner's regulations, the difference starts with $3 for a single person grantee or 7% of his grant and ranges *beyond* 10% of the grant depending upon the size of the family.

Those who administer the grants at issue have testified to the critical nature of the dollar amounts here at stake. The Commissioner of the Nassau County Department of Social Services has testified that "the present (pre-July 1 1969) standards of assistance provide for life on a level of subsistence if nothing more, and often less. The standards which will go into effect on July 1, 1969 provide for even less." (Affidavit of Joseph V. Barham, [illegible])

It is instructive to consider the Department of Social Services' itemization of the mean monthly grant allotment (plus rent and fuel for heating) provided a family of four living in the suburban counties surrounding New York City.[15] The Department allocates $109.20 of that amount for food, of which $29.58 — about a dollar a day — represents food for the adult head of the household, and $26.55 — about 81 cents a day — represents food for each of the three children. The amount of $4.40 ($51.10 per person) is allocated for a month's expenditures on household supplies (or clothing). The adult is allowed $12.60 and each child $11.45, for a monthly total of $44.65. The adult is provided $3.00 monthly for personal incidentals; the children $2.00 each, for a monthly total of $8.00. Each child is allocated $1.00 monthly for school expenses. The family as a whole is allocated $6.85 for laundry and $14.15 for utilities.

Nothing, it should be noted, is allocated for recreation; nothing is allocated for a telephone; nothing for books, magazines, newspapers (unless they be deemed household supplies); nothing for transportation; nothing for medical expenses not covered by Medicaid; nothing for birthday or Christmas gifts; nothing for the expenses of belonging to a church or a Boy Scout troop.[16] As noted by the Heineman Commission with reference to welfare budgets:

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[15] All the figures are taken from a worksheet that comprised Exhibit B to the affidavit of George W. Cheshire, Acting Commissioner of the New York State Department of Social Services, submitted in *Rosado v. Wyman*, 322 [illegible] Supp. No. [illegible] (1970), 18 U.S.L.W. 4466.

[16] Well-off people easily forget that almost all social relationships depend on the ability to spend some money. To go to school costs money for books, notebooks, pencils, gym shoes, and to keep up with the other kids. Without these the child begins to be an outcast. To go to church costs money for Sunday clothes, carfare to get there, and a little offering. Without these one cannot go. To belong to the Boy Scouts costs money for uniforms, occasional dues, shared costs of a picnic. Without these the Scouts [illegible] cease to [illegible] Budgets of Despair, *Poverty in America*, supra, at 438-39.

> "There are many items for which no money is budgeted, although those items may be needed. Funds for them can only come out of sums already allotted to the basic necessities of life. As one witness told the Commission, 'I either eat good and smell bad, or smell good and don't eat.'" The President's Commission on Income Maintenance Programs, *Poverty Amid Plenty:* The American Paradox 16 (1969).

A study of welfare families in Nassau County found that "allowances for toys, ice cream, and movies are considered critical (but unprovided for) necessities for children." Graham, *Civil Liberties Problems in Welfare Administration*, 43 N.Y.U.L. Rev. 836, 843 (1968). We daresay that an occasional toy or ice cream cone numbers among the "higher social aspirations" of even the welfare children of Nassau County.

Let us consider some of the more fundamental implications of having to survive even on the more generous budget of New York City—which budget appellees continue to receive because of the preliminary injunction at issue:

> "[I]n New York City, with one of the highest levels of welfare payments in the nation, a nutritional epidemological survey of 642 New York City children, age 10 to 13, established that 73.2 percent of the children were judged to have poor diets. The children whose families were *not* on welfare had twice the frequency of satisfactory diet history as those whose families were on welfare." Citizens Board of Inquiry into Hunger and Malnutrition in the United States, *Hunger, U.S.A.* 72 (1968) (emphasis in the original).

We refer again to the finding of the Court below—which finding is totally without challenge by appellants—that there is not an iota of evidence that food costs are higher in New York City than in the suburban counties. We note also that the children and the elderly in Nassau, as elsewhere, who comprise the bulk of the class represented by appellees are

among the groups most vulnerable to the effects of an inadequate diet:

> "Various segments of the population are not equally affected by improper food. Adult men and women, for instance, can stand deprivation of food or the right food without permanent consequences much longer than small children, children in general, adolescents, old people, pregnant and lactating women; small children will die rapidly as they are very susceptible to malnutrition, pregnant women and lactating women will abort and stop making milk. Old people who are incidentally one of the most vulnerable groups in the Nation, because they are poor, because they have usually one or more chronic diseases which is essentially incurable and make them open to quack suggestions and finally because they are isolated and often live alone, are particularly vulnerable group." Testimony of Dr. Jean Mayer, *Hearings Before the Senate Select Commission on Nutrition and Human Needs*, 90th Cong., 2nd Sess., pt. 1 at 26 (1969).

Not only are welfare families poorly nourished, even in such a comparatively generous state as New York, but the evidence is that they are poorly dressed as well. A study of welfare families in New York City found that:

> "Thirty percent of the mothers on welfare with children in school said that at times they did not have the necessary shoes or clothes. Twenty percent reported that they sometimes kept the children home from school because they were ashamed of the way the children were dressed." Podell, *Families on Welfare in New York City* 45 (1968).

The Court below found not an "iota" of evidence that clothing costs were less in the surrounding suburban counties than in New York City.[17] The Nassau County study by

[17] While food and clothing prices are identical in New York City and Westchester and Nassau (as judged by a comparison of cost figures published by the local welfare agencies in those localities), household furnishings cost more in Westchester and Nassau than in New York City. See Footnote 4, 303 F. Supp. at 344.

Graham did find, however, that "the deep and chronic discontent over clothing allowances" in Nassau could be attributed in large part to the feeling of recipients that "a deficient wardrobe, especially among schoolage children, is the most visible and therefore the most humiliating badge of poverty and welfare status". Graham, *supra* at 896. Clothing one's children decently may not be a "high level of social aspiration", but it is an aspiration apparently not met by present welfare schedules in Nassau. Obtaining adequate clothing or food while on welfare and, in general:

> "simply getting by (on a welfare budget) is a rigorous occupation, requiring exercise of great acumen, considerable purchasing skill, and enough flexibility to take advantage of marketing breaks of all types. It has required major effort and energy to maintain what has turned out to be a monotonous, depressing level of existence." Wedemeyer, *Maintenance Standards and Incentives* 4 (1969).

One can—and should— consider with particularity the impact of the differential at hand on food and clothing. To illustrate, in terms of the $191 received by a family of four in Nassau under appellant's schedule, the $17 grant increase that would result from bringing suburban grants up to the level of New York City grants could be translated into a 40 percent increase in the amount available for clothing.[18] Alternatively it could provide a 17 percent

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[18]One can, with even greater particularity, consider the actual items of needed clothing and household supplies that $5 per person per month purchases. The Nassau County Department of Social Services has published a Price Guide (A. 175-209) that provides a convenient reference for this purpose. Following that price list:

> An adult woman, for example, could use the additional $5 to buy a cotton dress ($5.00), a sweater ($5.00), a pair of slacks ($4.00 for summer slacks or $5.00 for winter slacks), a girdle ($5.00), six pairs of stockings (80¢ each), or a pair of galoshes ($4.00). (A. 181).
>
> Her male counterpart could buy a pair of summer trousers ($5.00), a hat or cap ($4.00), a bathrobe ($5.00), five under-

increase in the amount available for food, or a 100 percent increase in the amount available for personal incidentals, or simply a 10 percent increase in the amount available for all budgeted items.

However viewed, the grant differential represents very substantial and irreparable losses indeed. (With regard to actual impact on the named appellees of the cuts they suffered under § 131-a, we respectfully refer the Court to

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shirts (90¢ each), or a pair of galoshes ($5.50). (A. 182).

A boy age 12 to 15 could use a $5 increment to buy a raincoat ($5.00), a bathrobe ($4.00), a sweater ($5.00), a light jacket ($4.50), or a pair of sneakers ($4.00). (A. 180).

His sister age 12 to 15 could buy a skirt or pair of stretch pants ($5.00) a sweater ($4.00), a bathrobe ($5.00), two cotton juerseys ($2.50), or 12 pairs of socks (40¢ each). (A. 179).

A family could spend $5 on the household by buying an alarm clock ($3.00). (A. 183), an electric grill ($4.00), a 10" frying pan and a two-quart saucepan ($2.50 and $2.00), (A. 184), a straight chair ($5.50), a washable rug ($4.00) (A. 185), or a lightweight blanket ($5.00) (A. 186).

If the family saved its increment for two months and made its purchases in $10 units, the mother could buy a dressy dress ($9.00), a pair of shoes ($9.00), three blouses ($3.00 each), three slips ($3.00 each), three bras ($3.00 each), or three nightgowns ($3.00 each). (A. 181).

A male adult could buy a light jacket ($8.00), a sweater ($7.00), a pair of shes ($10.00), or three shirts ($3.00 each). (A. 182).

The son could buy three shirts or three pairs of pajamas ($3.00 each), three cotton jerseys ($3.00 each), or a pair of shoes ($9.00). (A. 180).

His sister could buy a dressy dress ($9.00), a swimsuit ($9.00), a pair of shoes ($7.00), or three pairs of pajamas ($3.00 each). (A. 179).

The household could acquire for $10 five sets of dishes ($2.00 per place setting), an electric iron ($11.00) (A. 183), an electric toaster ($11.00) (A. 184), or a kitchen table ($10.00), (A. 185).

our detailed description in the Statement of the Case, *supra*).

It is for such reasons that the Court below correctly concluded with regard to the differentials so casually labeled by appellants as "slight", that:

> "while this (differential) may seem minor to most citizens, it is of crucial importance to the recipients here, who present tragic hardship cases, some of them already the victims of severe cutbacks in other forms of special aid formerly received (e.g. telephone service for medicines and groceries: food for seeing-eye dogs; transportation allowance to hospitals; special diets for diabetics; readers for the blind; "homemakers" for those confined to wheelchairs, etc.). To an indigent person now receiving approximately 90¢ per day for food, an additional 15¢ per day can hardly be described as *de minimus*. Access to such bare necessities of life, on a non-discriminatory basis, involves a critical interest for those whose life depends on it." 303 F.Supp. at 348 (A. 114).

In *Dandridge v. Williams* ___US ___(1970), 38 U.S.L.W. 4277, this Court, just this week, noted that the public assistance grant "involves the most basic economic needs of impoverished human beings." This "dramatically real factual" circumstance may not call for the application of a special constitutional standard to welfare clients. Inescapably, however, this circumstance is at the heart of the issue here discussed. Depriving appellee-plaintiffs of an amount equivalent to 7 to 10% of their monthly welfare grant, and more, is to wreak an irreparable injury upon them. When, effective July 1, 1969, the New York State Legislature deprived appellees of access to special needs standards for grants, the needs standards of appellees were severely lowered. The extra reduction imposed upon these appellees, over and above the special needs reductions (also lost by New York City recipients), constituted an extreme injury with regard to the very essentials of life for appellees. The Court below properly restrained appellants from inflicting this injury pending final adjudication—especially in light of the merits of appellees' case, which we next discuss.

B. *The Differential in Standards of Need For Recipients Living in New York City and Those Living in the Surrounding Counties Violates the Uniformity Requirements of the Social Security Act.*

A clear—and indeed virtually indisputable—basis for concluding that appellees will probably succeed upon final adjudication is found in appellee-plaintiffs' contention that § 131-a and the appellants' implementing regulations violate the "Uniformity" requirements of the federal statute and regulations. Appellees briefed and argued this contention in the district court. That court, however, after summarizing the strong nature of appellees' argument concluded:

> "Plaintiffs' non-constitutional argument, however, is based primarily on regulations promulgated by H.E.W. Since the schedules and regulations adopted by defendants are now under review by that agency, which possesses considerable expertise with respect to its own regulations and should be entitled to interpret them in the light of the complexity of problems presented by various welfare programs, see 45 CFR 233.10(1), we at this stage defer determination as to the requirements of the Social Security Act in anticipation of a ruling by H.E.W." 303 F.Supp. at 350 (A. 119).

The lower court's opinion was handed down on August 4, 1969, well over eight months ago. Since then, two events have made clear that there is no further need to delay a judicial conclusion on appellee's statutory contention.

Most recently, this Court has made clear in *Rosado v. Wyman*, ___ U.S. ___, 38 U.S.L.W., 4266, 4268 (April 6, 1970) that deferral to HEW in cases such as the instant one is inappropriate. The Court did note that federal courts should seek the views of HEW where HEW has not elsewhere set forth its views or where "there is real doubt as to how the Department's standards apply to the particular state regulation or program." 38 U.S.L.W., at 4268. In this case, there is no real basis for doubt as to the

import of the federal regulation. There is no need for further delay as to the views of HEW. All of the justications for the state differentials in issue that were presented to the district court have also been presented to HEW. Indeed, on November 10, 1969, over five months ago, James Callison, Regional Commissioner of HEW wrote to appellant Wyman and described the reasons given by New York to justify the differential as "difficult to understand". (A. 172, 173) In concluding, Mr. Callison stated:

> "Given the materials submitted to date, we are unable to find that there is in effect a statewide standard being uniformly applied throughout the state." (A. 174)

In light of *Rosado, supra*, a case dealing with different aspects of the same New York statute involved in this case, there can be little doubt that the district court erred in not determining the probabilities of appellees' success on the statutory claim. Certainly HEW's conclusion, expressed on November 10, 1969, should settle any possible doubt as to the appropriateness of a judicial determination.

Appellees urge this Court to affirm the preliminary injunction on the basis that the court below did not abuse its discretion in finding that irreparable harm would be suffered by appellees without such an injunction, and because there is strong ground to conclude that appellees will succeed in their statutory contention. In that manner, this Court will meet the judicial obligation "to adjudicate this statutory claim in preference to deciding the original constitutional claim". *Rosado v. Wyman, supra*, 38 U.S.L.W. at 4267; *Dandridge v. Williams, supra*, 38 U.S.L.W. at 4278 (April 6, 1970). In the alternative, if this Court should wish the district court to reach the statutory issue before this Court considers it, we urge a remand for immediate consideration of the statutory issue—without disturbing the preliminary injunctions, in view of the harm that would otherwise befall appellees. We believe this alternative

unnecessary, however, and urge affirmation on the statutory grounds as argued hereafter.

Below, we first discuss the nature of the federal uniformity requirement. Thereafter, we discuss the manner in which the New York statute and regulations violate the uniformity requirement. We wish also to make reference here to the excellent discussion of the statutory issue in this case in the *amici curiae* brief of the Center on Social Welfare Policy and Law and the County of Nassau. In Section C of this point, we demonstrate why the preliminary injunctions should be affirmed on the ground of probable success under the traditional equal protection standard.

1. The Social Security Act and the Regulations promulgated thereunder require that the State promulgate statewide standards of need, determined upon an objective and equitable basis and uniformly applied to individuals in like situations throughout the state.

The present federal insistence on statewide uniformity in public assistance programs is deeply rooted in the history of the Social Security Act. Prior to 1935, public assistance programs operated on a local basis and recipients in each district received whatever grants the local agency or governing body deemed appropriate.[19] For the most part, assistance to the aged and to dependent children was optional at the local level. Because there was no statewide standard, the poor families within each state were subjected to totally arbitrary variances in providing for their basic needs, from some amount to zero, depending on the local

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[19] A leading commentator has said of this period: "Studies of the administration of poor relief in the period when local responsibility was dominant found inefficiency, political favoritism, and occasional fraud to be the characteristic elements." Steiner, *Social Insecurity: The Politics of Welfare*, p. 16 (1966).

county's disposition to provide budgetary allocations for the poor. Serious inequities resulted whereby families in entirely similar situations were provided drastically different allowances. As noted by the Advisory Commission on Intergovernmental Relations:

> "By 1934, the year prior to the passage of the Social Security Act, the States had made some progress in establishing public assistance programs. However, coverage of needy persons in any of the aforementioned groups was far from complete throughout the country. The Social Security Board in its First Annual Report summarized the situation as follows:
>
> (1) Only thirty of the fifty-one jurisdictions (states and territories) had legislation permitting or providing old-age assistance;
>
> (2) within this thirty, one third of the counties did not provide old-age assistance;
>
> (3) in most of the counties where assistance was provided, the qualification requirements were highly restrictive and lack of funds resulted in long waiting lists;
>
> (4) forty-five states authorized aid to dependent children, but it was provided in less than half of the local units in these states, and
>
> (5) in the twenty-four states with laws for public pensions to the blind, only two-thirds of the counties participated in these programs."
>
> Advisory Commission on InterGovernmental Relations, *Statutory and Administrative Controls Associated With Federal Grants for Public Assistance* (1964) at p. 4.

The United States Congress recognized that the instability and unfairness of this kind of patchwork, unequal treatment of marginal families within a state was a fundamental concern, nationwide, and accordingly enacted the Social Security Act with primary emphasis being placed upon uniform, equal treatment of similarly situated persons. (See

generally, Brown, "Public Relief, 1929 to 1939," 1940, p. 16.) Hence, from the inception of federal participation in the public assistance field, a paramount policy in federal administrative action was to correct the ills caused by previous uneven provision of basic needs, and to positively support the fundamental notion of equal treatment within each state:

> "The (Social Security) Board had interpreted the stipulation of a 'state plan' to require a state to establish statewide standards for determining eligibility and creative needs so that persons in equal circumstances would be treated equally throughout the state." Altmeyer, *The Formative Years of Social Security*, (1968), p. 264. See also pp. 80 et seq and 191.

In fact, however, three statutory provisions have long been relied upon by HEW to justify the "uniformity" requirement. See *Statutory and Administrative Controls Associated with Federal Grants for Public Assistance, supra*, at pp. 12-13. These statutory provisions are: (1) The requirement that each state welfare plan must be in effect in all political subdivisions of the state; (2) the requirement that there be statewide financial participation in each state welfare program; (3) the requirement that a "single state agency" must be designated to administer the program.[20]

In interpreting these statutory provisions HEW has held that:

> "The purpose of the requirements relating to statewide operation is to assure that the public assistance program in which there is federal financial participation will be in effect throughout the state; that local offices will be available where persons can apply for assistance and services; *that the benefits of the programs will be equally available to all eligible*

[20] 42 U.S.C. § 602 (a) (1), (2), and (3) and § 1382 (a) (1), (2), (3) contain their respective provisions for AFDC and the combined AABD programs.

persons; and that state policies, standards and methods will apply equally to persons in like situations wherever they may live.

"Where the program is administered by political subdivisions under state supervision, the state agency is responsible for assuring that the state program and state rules and regulations are in effect in all political subdivisions. *This means that the specific eligibility factors for each assistance program, including resources and standards of need, and any additional eligibility factors included in the approved state plan are uniformly applied in areas, offices or political subdivisions.*"

Handbook of Public Assistance Administration, United States Department of Health, Education and Welfare, Part II, § 4300, (hereinafter referred to as HEW Handbook.) (Emphasis added.)

Moreover, each State is responsible for providing assistance "on a basis consistent with equitable treatment of all eligible individuals in similar circumstances throughout the State, in accordance with the intent of the Social Security Act" and must avoid "inequitable provision for assistance and administration among localities within a State..." *HEW* Handbook, Part II, § 3300.

"State and federal funds will be apportioned among the political subdivisions on a basis consistent with equitable treatment of individuals in similar circumstances throughout the state." HEW Handbook, Part II, § 3200.3.

The most recent, relevant HEW regulations provide, among other things, that state welfare plans must meet the following requirements:

"1. General. Provide that the determination of need and amount of assistance for all applicants and recipients will be made on an objective and equitable basis..."

2. *Standards of Assistance*

(i) Specify a statewide *standard*, expressed in money amounts, to be used in determining

(a) the need of applicants and recipients and
(b) the amount of the assistance payment.

* * *

"(iii) Provide that the standard will be *uniformly* applied throughout the State." 45 CFR § 233.20 (a); 34 Fed. Reg. 1394 (January 29, 1969) (Emphasis added.)

In effect, then, the three statutory requirements set forth in the Social Security Act (state financial participation, statewide plan, single state agency) are "closely related" and have the underlying objective of "facilitating statewide maintenance of the standards of each State plan." HEW Handbook, Part II, § 3200.3. Such statewide standards must be "objectively" determined. 45 CFR § 233.20(a).

Thus, federal law expressly seeks to insure evenhanded application of standards within each state. The dispensing of a varying, non-uniform standard (of need as represented by the allowances) is prohibited in state programs receiving federal funding. For example, a special disability allowance, if it is to be legally implemented in a state plan, must be provided in all districts, not in a certain few to the exclusion of others. Likewise, a special grant for the "social cost of living", primarily composed of the transportation to recreational facilities, must be determined on an objective basis uniformly available throughout the state wherever needy people experience that "social cost". If the standard of need in one part of the state includes a grant for transportation to day care centers, and people in another part of the state also have a "social need" for transportation to day care centers, the latter people must also have the benefit of the special grant.

Sudden, arbitrary and irrational fluctuations between regions are in effect prohibited by the Social Security Act as violations of statewide uniformity requirements. The ultimate test of the state's compliance with the Act's uniformity dictates is whether differences in provisions to various localities are based upon rational cost of needs factors.

> "In summary, the State standard must represent items of need to be made available to all recipients statewide. *Differences in money amounts, if they exist, must result from demonstrable differences in the cost of these items in various sections of the the State.*" (Emphasis added.) Letter from James Callison, HEW Regional Commissioner to George K. Wyman, dated November 10, 1969 (A. 172).

Without such requirements, a fragmented and piecemeal state plan would result, creating random discrimination dependent upon political considerations wholly unrelated to the meeting of individuals basic needs. Such a result would violate the Social Security Act, and, until the state is properly ordered to restore uniformity would mean that federal funds dispersed to such a non-conforming state would be completely misspent.[21] Where a drastic differential is imposed between different "political subdivisions" within a state, as was imposed here by the State when it fragmented the greater metropolitan New York City area, the State must demonstrate that its plan is still "statewide", "objective and equitable", "uniformly applied throughout the State" and representative of "State policies, standards and methods [which] will apply equally to persons in like situations wherever they may live", HEW Handbook, Pt. II, § 4300; 45 CFR § 233.20(a)(1), (2), 34 Fed. Reg. 1394 (1969). Cf. *Zemel v. Rusk*, 381 U.S. 1, 11 (1965).

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[21] The lower three-judge court, while deferring to HEW on New York's compliance in fact with the requirement of uniformity, indicated its view on the meaning of statewideness:

> "On their face the foregoing provisions of the Social Security Act regulations would appear to be aimed at the fundamentally sound objective of assuring that persons in like circumstances should be treated equally throughout a state rather than exposed to the type of unfair hodgepodge that could result from adoption of different eligibility standards or other criteria for different areas." 303 F.Supp. 350-351 (A119).

2. New York's Provision of Significantly Lower Need Standards for Recipients in the Seven Counties Surrounding New York City than Those For New York City Recipients Violates the Social Security Act's Requirement of a Uniform Statewide Standard of Need.

The provision of differentials by § 131-a, whereunder the standards in the counties surrounding New York City are lowered below those of New York City, deviates sharply from the uniform standards which had existed for years.[22] In New York City and the surrounding counties, the common standards previously promulgated by appellant Wyman were based on revised pricing studies made each year. All previous studies indicated that there were no cost of living variations throughout greater New York City. The last of these was a 1968 pricing study upon which appellant Wyman's 1968 schedules (providing uniform allowances) were based. The only prior variation in cost of meeting needs throughout the whole state was for utility expenses and even this variation did not exist between New York City and its surrounding counties.[23]

It is against this background, when § 131-a and 18 NYCRR 352.4 fragmented the New York metropolitan area and reduced subsistence levels of one group of its recipients below those of another, that HEW firmly placed the burden upon the State to justify this departure from uniformity. On April 16, 1969, well before the statute was to take effect, the Regional Commissioner for HEW wrote to appellant Wyman, demanding that New York produce:

> "supporting data. . . demonstrating that the differentation in maximums between New York City and all other areas of the state is not inconsistent with

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[22]See A. 41, Deposition of Appellant Wyman.

[23]As noted by the court below, however, welfare agency pricing lists indicated that household furnishings were more expensive in the suburban area than in New York City. 303 F. Supp. at 344, footnote 4. (A. 122).

> statewide requirements . . . while variations in amounts used in determining need and payments may be justified on the basis of differences in the cost of living in local areas. This is a factor to be taken into consideration in establishing the statewide standards which could then be applied uniformly in all areas with the same characteristics." Letter from HEW Regional Commissioner James Callison to George K. Wyman, April 16, 1969, cited by lower court, 303 F.Supp. at 351 (A. 119).

Further, as HEW noted, Subdivision 4 of Section 131-a, the statutory provision authorizing appellant Wyman to promulgate schedules of higher allowances to the surrounding counties (up to the New York City level) does not itself cure the defect of non-uniformity if equal schedules are not in fact effected by the Commissioner, nor does that discretion alter New York's burden of demonstrating compliance with federal uniformity requirements.

> "In this regard, we do not question that § 131-a (4) of the Social Services law would authorize a method of operation which is consistent with statewideness requirements. However, there must be assurance that in implementing such provision, *you will undertake to maintain the proper relationship to local costs* and to exercise your power to promulgate revised schedules in any case in which you determine such revision is called for, i.e., that such action is not dependent on a request or application therefor by local authorities." Letter from HEW Commissioner James Callison to George K. Wyman, dated November, 1969 (A. 172). (Emphasis added).

Before examining the appellant's attempts to justify the differentials, we should again note precisely what is and what is not included in the allowances at issue herein. The basic monthly grant is to meet a person's or family's minimal needs for food (over half of the grant), clothing, household supplies, furniture, laundry, utilities, and personal incidentals (toothpaste, aspirin, shaving utensils, and supplies). *Nothing* is allocated for a telephone, books, news-

papers, *transportation or recreation*. And the basic grant does *not* include rent, a fact which appellants repeatedly ignore. Hence, component items in the grant are specific. The [federal] regulations earlier cited require that whatever a state designates as the component items (which, when totalled, yields the state standard of need) must be in effect throughout the state. Hence, if the grant in Albany County includes meeting the need for a certain item, such as razor blades, that "item" must be included as a need within the standard throughout the state (at least wherever men shave)—in all districts.

In response to HEW's demands for data supporting the sudden departure from past uniform practices caused by Section 131-a—and in response to the instant lawsuit—what data and what justifications were offered by appellant? More so than could any argument, the testimony of appellant Wyman in this case makes crystal clear the frivolous nature of the justification presented to the court below (and to HEW) for the differentials at issue. The basic rationale for the differentials prohibited by the preliminary injunction was stated by appellant Wyman in his deposition:

"Q - Why is there now a 7 to 10 percent differential between families in New York City and families in the counties formerly on SA-1?

A - The essential differences are the complexities of urban living in the City of New York, the necessity for provision of transportation items on a regular basis, the fact that there are cultural opportunities, readily available transportation, community center facilities, and clinic facilities in New York City that are not available in other areas of the state to the same extent, certainly not the components of the urban living requirements.

Q - And the additional grant of approximately $4, it was your testimony, although it is a bit more, is to cover transportation to these facilities?

A - Yes."

Upon what basis did appellant reach his conclusion? (A. 60):

"Q - In establishing these differentials, did you make a study of the relative availability and usage of museums, clinics, community centers, cultural institutions in New York City, in Westchester County, in Nassau County, and so on?

A - No."

Commissioner Wyman then showed a letter he had earlier submitted to HEW in which he set forth his basic rationale with greater specificity, indicating particular transportation needs. He was asked (A. 64):

"Q - Are you aware of the transportation system in Nassau County.

A - No.

Q - Are you aware that there are at least 17 separate franchised bus lines without interchange between them?

A - No.

(47) Q - Are you aware that the minimum fee is a minimum of 25 cents?

Mr. Hoffman: I object. These are leading questions.

Q - Do recipients, to your knowledge, have a need for transportation to their welfare centers in Nassau County?

A - I should imagine so, on occasion.

Q - Approximately the same as recipients in New York City?

A - I don't know.

Q - No reason to believe otherwise?

A - No reason to believe otherwise.

Q - Are you aware of recreational—the second illustration in this letter is recreational centers for the aged. Are you aware of recreational centers for the aged in Nassau County?

A - No.

Q - Are there any, to your knowledge?

A - I don't know of any.

Q - But you don't know that there are not?

A - No.

Q - The same is true for Westchester County?

A - Right

(48) Q - There are more in New York City?

A - Yes.

Q - Are you aware of day care centers for children in Nassau County?

A - Yes.

Q - There are?

A - There are some.

Q - And there are day care centers for children in Westchester County?

A - Yes.

Q - And for those people who need to use them there are transportation costs involved?

A - Yes.

Q - To the extent that their transportation systems cost more than New York City, the cost is more?

A - That is correct.

Q - Are you aware of cultural recreational facilities in Nassau County and Westchester County?

A - No.

Q - You think there are none?

A - I just don't know of any.

Q - To the extent there are, people would use them as in New York City?

(49) A - That's right.

Q - And transportation costs would be involved to get there?

A - Yes.

Q - Another illustration used here are beaches. You are aware of beaches in New York City?

A - Yes.

Q - And you are aware of transportation to get to them?

A - Yes.

Q - And one could get to those beaches from one subway ride?

A - Yes.

Q - That is 20 cents and for the aged 10 cents?

A - Yes.

Q - There are beaches in Nassau County?

A - Yes, I am sure there are.

Q - And there is no subway system to make it quite so convenient, is there?[24]

A - No.

Q - The same would be true of parks?

A - I would assume so.

Q - So these are items of budgeted need for people in New York City that are not items of budgeted (50) need for people in Nassau County and Westchester County?

A - That is correct.

Q - So there is a difference . . .

A - Budgeted in the sense of explaining the differential.

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[24]See affidavit of Planning Commission, Director John Burdis (A. 70). Transportation in New York City is in fact comparatively cheap as the subway system reaches most points of need or interest at 30 cents per ride (20 cents at the time of lower court ruling). In contrast, public transportation in Nassau and Westchester is cumbersome and expensive.

Q - Reflecting itself in the amount of money being given to people and the calculation of the grant?

A - Right."

Finally, admitting candidly the State's use of two or more standards of need (A. 76):

"Q - When you promulgated the schedule for the suburban counties, did you also take into account the need for cultural and visiting cultural facilities in those communities?

A - No, not to the same extent."

3. Other Rationales Offered by Appellants Below.

In their jurisdictional statement (p. 7) and below, appellants argued, "Moreover, the Legislature was plainly entitled to consider the sheer number of welfare recipients in New York City–889,000 out of 1,211,000 in the State (1968 Monthly average)." We readily confess that we do not understand why the Legislature–or appellants–consider this a factor. The appellants appear to have confused basic matters. Certainly the Legislature may have wanted to consider the larger numbers of recipients in New York City for the purpose of examining why the public assistance rolls were growing, for the purpose of helping meeting extra administrative costs in New York City, etc. Its foolishness as an explanation of differential treatment in meeting the needs of recipients, however, is too obvious for further comment by us. A recipient in New York City does not need more food than a recipient in Westchester because there are more recipients in New York City. This rationale cannot possibly justify deviation from uniformity requirements.

In a similar irrelevant vein, the appellants cited below, and to this Court, somewhat higher actual welfare payments in New York City, on the average, than elsewhere.[25] How-

[25]On examination below, appellees' counsel cited New York State Department's published figures for October, 1968, showing payments

ever, it is *not actual payment but standard of need and allowance* that is relevant. One recipient may receive less than another recipient with an identical standard of need because he has somewhat more income than the other recipient. The actual grant is the difference between income and standard. The consequence of lowering a *standard* in a locality, because of a lower *payment* average, would be to penalize the recipients of that locality by leaving them with less total income (welfare plus private income) than recipients of another locality who have no private income.

The appellants do not explain whether recipients in Nassau County receive more support payments than those in New York City, or work more, or receive more social insurance payments. Nor does their brief explain what appellants have admitted in *Rosado, supra*: that much of the variation in actual payment was due to the variation in the manner in which local agencies administered special needs requirements.[26] Certainly, however, no possible rationale can be found for a lower *standard of need* from the fact that averaged payments differ from locality to locality.

The appellants' justifications to the Court below are tantamount to saying, "We can create any differentials we want despite the uniformity requirements. We don't have to show any reasons. We need only make bald assertions, no matter how unsupported or without reason they may be."[27]

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in Nassau and Westchester were higher than in New York City. They were unexplained by appellant Wyman (A. 88).

[26]Affidavit of Acting Social Services Comm. Chesbro, *Rosado v. Wyman*, O.T. 1969, No. 540, Appendix, p. 98.

[27]Appellants also cited a blatantly misleading "justification" to the Court below and continue to do so before this Court. The argument, briefly, is that New York City recipients received for some nine months prior to July 1, 1969, a "cyclical" flat grant of $100 per person above their "recurring" allowance. Recipients outside of New York City did not. Appellants argue that this justifies the extra-differential for New York City recipients post July 1, 1969, quoting

4. Appellants Raise New Arguments in this Court, not Raised Below, in Favor of Differentials.

Since the issuance of the preliminary injunctions and the filing of this appeal, the appellants—in their brief to this Court—seek to justify the differentials on evidence that "the actual cost of living" of a welfare recipient in New York City "is in excess" of that of a welfare recipient in the surrounding counties and "the Legislature was fully cognizant of this fact". (p. 25 Appellants' Brief). What is the evidence of higher "actual cost of living of a welfare recipient in New York City?" Appellants introduce in this Court three arguments for higher costs in New York City.

Appellants argue that there is a higher crime rate in New York City than in its suburbs. (pp. 28-29 Appellants' Brief). While we doubt the comparative significance of appellants' statistics, such statistics are largely irrelevant. Even if New York City recipients suffer greater theft of welfare checks, the pertinent regulations provide that stolen checks may be replaced (and in fact they are), 18 NYCRR 352.4(9)(10) (reissued Sept. 10, 1969). And so may stolen cash be replaced: Cf. 18 NYCRR § 372.3. Thus, the possibility that a New York City recipient may suffer a greater chance of a stolen check (which will be replaced if stolen) hardly justifies a larger check in the first place.

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part of their initial application to HEW for permission to establish the cyclical grant in New York City. (p. 32-33 Appellants' Brief). What appellants fail to explain is that the cyclical grant was approved by HEW as a "demonstration" procedure under Section 1115 of the Social Security Act for the purpose of testing a *new method* of administering grants. The extra-cyclical flat grant in New York City was to replace the extensive list of "special" grants for clothing, furniture, and the like. *These "special" grants continued in effect in the suburban counties and upstate.* HEW approved merely a different method of meeting need but not a method of meeting different needs. (A. 53). *The new schedules of July 1, 1969, wiped out the "special grants" outside of New York City* while the differential in favor of New York City continued, at least in part, the protection of the "cyclical" flat grant.

Next, in an extraordinary example of obtuse thought, appellants argue "housing costs for New York City were by far the lowest throughout the State" and the Legislature knew it. Appellants do not state how the Legislature knows this, but they do state why New York City housing costs are low: rent control. How do lower rental costs in New York City than in Nassau or Westchester justify higher welfare grants in New York City? Rent control, appellants assert, citing various studies, leads to deteriorating housing which is abandoned and withdrawn from the market and that leads to "capital losses". The families save money but the market loses housing units. (p. 26-27, Appellants' Brief). And, somehow, the cost of living for welfare families in New York City increases.

The appellants, naturally, do not examine whether or not welfare recipients in the surrounding counties also live in deteriorating housing. They do not examine how well the landlords do or do not make needed repairs there. They have, we feel safe to assume, not even inquired into the subject. Nor do they recite that rent control exists in Nassau County, Yonkers, White Plains, New Rochelle and parts of Monroe County.[28] They rely simply on their formula: rent control leads to cheaper rents which lead to capital losses and withdrawal of housing units from the market.

Of course, if there is any conceivable merit to appellants' new evidence of higher living costs in New York City, the appropriate move for appellants is to go to trial and show their evidence to the district court. Upon trial, appellees can examine appellants on the matter and the district court can weigh the evidence. Such claims are not appropriately raised for the first time before this Court. Compare *Schley v. Pullman's Palace Car Co.*, 120 U.S. 575 (1887).

Equally inappropriate for raising before this Court at this time is appellants second new piece of "evidence" allegedly

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[28]See 9(C) NYCRR 2100.8.

establishing higher living costs in New York City. This argument is that New York City sales taxes total (State and City) 6%, while Nassau sales tax totals 5% and Westchester totals 3%, except for Yonkers which is presently 6%. (p. 28, Appellants' Brief). Aside from the apparent lack of justification for a $5 differential per person resulting from these various sales taxes, we note the existence of other sales taxes in Suffolk, Ulster, Broome, Greene, Monroe, and Dutchess Counties. Monroe County has a total sales tax of 6% (just as does New York City, as does Yonkers). See CCH, *State Tax Reporter*, Vol. 2, § 6593-5.

Moreover, appellants fail to apprise the Court of the impact of such taxes on the essential items the welfare grant is intended to purchase. For example, food (as well as many other necessaries) are not subject to the sales tax. Nor do appellants tell us whether the cost of living studies which constitute the basis for welfare grant schedules, and which report identical food and clothing prices among New York City, Nassau and Westchester, and higher furniture costs in the suburban counties,[29] include or exclude sales tax computations. However, the appellants' department, in issuing former Regulation 352.4, Title 18, NYCRR which was based on the latter cost of living studies, stated the purpose of the monthly grant was to cover expenses of food, clothing, household supplies, etc., "including sales taxes related thereto." See Footnote 3, 303 F.Supp. at 3. (A. 122). The department, in issuing the latter regulation, found no sufficient difference in total cost of such items in New York City and the surrounding counties to warrant a differential. Upon the basis of what information do appellants now find a difference in costs? Appellants admittedly made no new studies.

Our point, once again, is two fold: first, appellants new "evidence" is woefully inadequate in every way; second, if there is indeed any conceivable merit to appellants new claims, they are appropriately raised before the district

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[29]See Footnote 4, 303 F. Supp at 344. (A. 122).

court, and not for the first time (on appeal) to this Court. A trial, which was originally set for October 6, 1969, and was delayed because of this appeal, continues to await appellants.

Clearly, appellants, as an afterthought to legislative creation of the differential, have simply tried to conjure up facts as to New York City without any consideration of their existence or applicability to other areas. Such a transparent attempt to disguise evasion of uniformity requirements cannot be tolerated if the Social Security Act's insistence upon statewideness is to have any meaning whatever.

New York has, in the past, exhibited a pattern of nonconformity. In 1950-51, it was the only state refusing to adopt statewide standards for determining eligibility for public assistance. Then the state refused to accept the federal interpretation that state-widedness required uniformity in grant levels where the costs of meeting needs covered by the grant were uniform. After extensive negotiations with federal authorities, wherein a joint study group demonstrated to New York's surprise that there was "very little difference between New York City and upstate New York, except for rent," the state recanted its position. Altmeyer, *The Formative Years Of Social Security*, 192 - 193 (1968). See Steiner, *Social Insecurity*, *supra* at 110. Accordingly, statewide standards were implemented on a uniform basis. Now, unfortunately, New York is attempting to revert to its old method of piecemeal meeting of needs.

In summary, then, the evidence compels the following: Even though less money was available in Nassau, other suburban counties, and in New York City for basic items such as food and clothing after the July 1, 1969 schedules were issued,[30] an extra differential of 7 to 10 percent and more

[30]It is critical, we believe, to keep in mind this fact when considering appellants' arguments. Appellee Rothstein, for example, received a total of $20.88 *less* for necessities after the July 1, 1969, schedules were issued. The five dollars received as a result of the preliminary injunction hardly accounts for this loss. Appellee Batson, it

was established in favor of New York City on the ground that recipients in New York City need to pay for transportation to beaches, clinics, welfare centers, day care centers, recreational centers, and the like. However, no study (objective or otherwise) at all was undertaken with regard to the existence of these centers or their use in the suburban counties, though obviously some or many exist there and are used. In fact, transportation costs are considerably higher in the suburban counties even though the extra money is given to New York City recipients.

But, appellants argue, though it may *cost more* for recipients in Westchester or Nassau to visit a beach or welfare center than it does for recipients in New York City, recipients in New York City have a "greater need" for such transportation. (Appellants' Jurisdictional Statement, p. 22.) Why is that so? Because, according to appellants' Senior Attorney, Vernon Murphy, New York City recipients have a "higher level of social aspiration". How does Mr. Murphy (or the appellants) know this? There is simply silence in response to such a question.

Counsel for appellees, having served on past occasions welfare recipients in both New York City and in Nassau and Westchester, might seek to assure the Court that their suburban clients have as high a "social aspiration" as their city clients. But surely such assurances are uncalled for. A ten percent differential in welfare grants, severely affecting the meager cash available for such basics as food and shelter, may not—consistently with the Social Security Act—rest on subjective speculation concerning the aspirations of the poor and needy of Yonkers in comparison to the poor and needy of the Bronx with regard to visiting beaches.[31]

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might be added, received about $100 less. (See Statement of the Case, *supra*.)

[31] At the very least, someone ought to *ask* the welfare poor of Yonkers about their aspirations on this subject. The conclusion of the court below could not be more correct: ". . . Even if it could be shown that a part of such [welfare] payments is used for these [re-

It is to be recalled that the federal regulations require that differences in need standards be based upon objective data, that individuals in varying parts of the state be treated equally, that the individual in Yonkers who has a need to visit a beach, welfare center, or day care center have that need recognized if such a need is recognized for the individual in another part of the state.

The issue on this appeal, of course, is not whether—upon final adjudication—the state will finally have found some basis, consistent with the Social Security Act, for its decision to grant a higher need standard for the "social aspirations" of the people of Queens as distinguished from the people of Yonkers or Poughkeepsie. The issue is merely whether there is, at this time, good reason to believe that the federal uniformity requirement has been violated—thus justifying the preliminary injunction. The conclusion that the uniformity requirement has been violated appears clear.

The HEW Regional Commissioner stated in his November 10, 1969, letter to appellant Wyman (A. 172):

> "In your letter of June 2, 1969, you indicate that the differentiation between New York City and the rest of the state is based upon 'its size and complexity, resulting in special requirements for transportation to use available services.' It is difficult to

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creational] purposes, defendant erroneously assumes that welfare recipients in the suburban counties live in more pleasant and less frustrating surroundings than those in New York City. The picture of suburban welfare recipients living in garden apartments (the term used on oral argument), located on the edge of a park, is an unreal one. It ignores the existence of many rundown tenements in the slum districts of our surrounding suburban counties, which unfortunately provide the principal housing facilities for welfare recipients." 303 F. Supp. 349 (A. 116). See "Poverty in Spread City: A Study of Constraints On the Poor in Nassau County," published by the Organization for Social and Technical Innovation, [Cambridge, Mass] and Llewelyn-Davies Weeks, Forester-Walker & Bor [N.Y., N.Y.] (August, 1969).

> understand how transportation costs could account for the differentiation in grant levels. Moreover, such differentiation does not appear to be supported by the most recent information (August 1968) from the Bureau of Labor Statistics on living costs within the state, e.g., such costs as Buffalo as compared to New York City."

We also have difficulty understanding. In view of appellant Wyman's abysmal failure to show any rational basis for the disparate allowances, the lower court's directive to apply an "objective," "cost of needs" rationale was proper.[32]

C. *The Erroneous Characterization by Appellants of the Equal Protection Analysis by the Court Below.*

In its discussion of the equal protection analysis by the court below, appellants' brief engages in an unhappy medley of erroneous characterization, misleading analogies and plain irrelevancy. Below we review these aspects of appellants' brief and compare them to what the court did conclude.

1. Appellants' Erroneous Characterization of the Equal Protection Standards Considered by the Court Below.

Appellants argue throughout their brief and jurisdictional statement that the decision of the court below rested upon application of "a more rigorous standard for statutes relating to welfare allowances." (p. 30, Appellants' Brief). However, the court below carefully stated the opposite. Said the court:

> ". . . we must conclude, on the basis of the record now before us, that the differential between allow-

[32]The order below, restraining appellant Wyman from promulgating schedules except on an "objective," "cost of needs basis," carefully avoided specifically mandating a level of benefits, higher or lower. Rather, the injunction required that whatever level is implemented be based on objective, relevant factors. Commissioner Wyman complied with this directive for use of objective levels by implementing grants in surrounding counties *equal* to those provided in New York City. This is hardly consistent with his attempt to rationalize *unequal* levels to this Court.

> ance levels established for welfare recipients in New York City and those in surrounding counties constitutes an arbitrary, invidious and irrational inequality in violation of the Equal Protection Clause, even when judged by the traditional, rather than the more stringent standard." 303 F. Supp. at 347 (A 112).

Appellants thus misconstrue the nature of the reasoning of the court below. The court below held that the differential herein violates both the "traditional" and the "more stringent standard". While the court below was willing to put aside the presumptions which ordinarily favor state legislative classifications, it did not find it necessary to do so. Even such presumptions fall when no rational grounds can be found to justify them. *Gulf, Colorado and Santa Fe Railway v. Ellis*, 165 U.S. 150 (1896). And here, no rational basis could be found to justify the classifications.

It is true that, in addition to finding that the appellants' differential probably violated the "traditional" equal protection standard, the court below also concluded that "a more stringent standard" should be applied where "fundamental or critical personal rights" are adversely affected – especially where the differentials "operate to the detriment of a disadvantaged minority". 303 F. Supp at 346. This conclusion on the part of the court below appears invalid in light of this Court's subsequent opinion in *Dandridge v. Williams*, __U.S. __, (1970), 38 U.S.L.W. 4277. Our point, however, is that the conclusion of the court below with regard to the more stringent standard is superfluous to this case in light of the solid basis for the conclusion of the court below that the traditional standard is also violated by the invidious quality of appellants' differential. It is for the latter reason that the equal protection aspect of this appeal, aside from its preliminary nature, is entirely distinguishable from *Dandridge, supra*.

In *Dandridge, supra*, this Court determined that "solid foundation for the regulation [there at issue] can be found in the State's legitimate interest in incouraging employment and in avoiding discrimination between welfare families and

the familes of the working poor." 38 U.S.L.W. at 4281. But there is no such solid ground here. Here, there is no minimally rational ground.

It was precisely such minimum rationality for which the Court diligently searched in the record below. Appellants claim the Court "improperly reversed the presumption of validity of the state statute", (p. 23, Appellants Brief.) On the contrary, the Court examined each justification offered for a conceivable and reasonable basis for the differential. None appeared. Appellants claim that the "proof adduced by appellants that there was an higher actual cost of living to metropolitan residents not reflected in item-by-item specifications in the standard of need", was ignored by the court below. (p. 15, Appellants' Brief).[33] However, the opposite is true. The court below carefully and exhaustively examined every suggestion by appellants of any proof whatsoever. The Court found not "an iota of evidence" to support the differential. 303 F. Supp. at 349.

Appellants fail to grasp the qualitative distinction between their ability to *name* an alleged "justification" for the differential and their inability (as well as our inability and the district court's inability) to show a *rational basis* for the "justification". Thus appellants name, as a justification, the greater number of recipients in New York City. But there is no rational relationship between that fact and the reason why a Queens (New York City) recipient's standard of need should be higher than a Nassau County recipient's standard. Appellants alleged, as their primary justifi-

[33]This claim by appellants shifts throughout. Thus what is alleged as out-of-hand rejection of proof of actual higher costs in New York City (P. 15, Appellants' Brief) becomes rejection of "precise testimony" on legislative purpose (P. 30) and, in appellants' jurisdictional statement, it is rejection by the Court of "uncontroverted proof" as to higher costs in New York City related to the "need" for more frequent transportation. This may or may not have been a legislative purpose in creating the differentials. But there was not an "iota of proof" that such a greater need exists. Nor is there any rational ground to believe that it exists.

cation, a greater "social need" in New York City for transportation to such places as day care centers. But how could it be that mothers in the Bronx have a greater *need* for transportation to day care centers than mothers in Yonkers? Mothers need day care centers if they work. Mothers in the Bronx are no more or less prone to work than mothers in Yonkers. For appellants to simply *assert* the opposite—without any ground whatsoever to support such a conclusion—and then claim that such an assertion provides a rational basis for discriminating against the Westchester mother, and further claim that such assertion meets the requirements of the Equal Protection Clause, is to push the "traditional" standard very far indeed.[34] Especially when (as the record indicates) transportation costs more in the suburban counties than it does in New York City. We are not aware that the "traditional" standard requires the abandonment of all common sense or reasoning power. And the court below properly refused to find that it did.

And, of course, for all the reasons indicated earlier with regard to the statutory violations, appellants newly-thought-up "justifications", raised for the first time before this Court, are as lacking in sensible rationale for equal protection purposes as they are for statutory uniformity purposes.

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[34] *Cf. Turner v. Fouche*, ____ U.S. ____, 38 U.S.L.W. 4090 (January 19, 1970). In *Turner* the Court invalidated under traditional equal protection standards, id. at 4094, a Georgia statute which limited membership on county boards of education to persons owning real property. The argument that the lack of ownership of realty demonstrated a lack of attachment to the community and its educational values was rejected as having no basis in fact. The Court noted, comparing *Leary v. United States*, 395 U.S. 6 (1929) and *Toi v. United States*, 319 U.S. 463 (1943), that

> "However reasonable the assumption that those who own realty do possess such an attachment, Georgia may not rationally presume that the quality is necessarily wanting in all citizens of the county whose estates are less than freehold." 38 U.S.L.W. at 4094.

Moreover, they surely should be initially raised before the district court—as earlier herein discussed—rather than before this Court, especially in light of the preliminary nature of the injunction here appealed.

2. Appellants' Misleading Analogies.

For reasons which escape us, appellants suggest (p. 38-39, Appellants' Brief) that appellees would require every state to pay the same welfare benefits to each recipient. Of course, appellees make no such argument. We contend, simply that the Fourteenth Amendment requires that some rational basis exist for significantly different treatment of welfare recipients who receive grants under the same state welfare program and who are identically situated except for the town they live in.

In addition, appellants rely heavily on *Jefferson v. Hackney*, 304 F. Supp. 1332 (N.D. Tex., 1969), for the proposition that the state may pay different amounts of benefit to different welfare recipients in the same need. However, the district court in *Jefferson* was strongly and explicitly influenced in its equal protection reasoning by the fact that plaintiffs therein sought to compare differing benefit levels in *different welfare programs* (AFDC and OAA), (which programs were believed by the *Jefferson* court to have different purposes). The discriminations herein are between recipients in the same programs. The basis for concluding which recipient gets the higher benefits is solely the town in which he resides. Compare *Shapiro v. Thompson*, 394 U.S. 618 (1969).

Appellants cite a series of cases which permit separate legislation in the City of New York (pp. 23 and 39, Appellants' Brief). These cases, however, were based on a finding of rational factors, such as the different natures of housing in New York City, leading to a special Multiple Dwelling Law, or on a valid countervailing state purpose, as with a property use tax. No such finding was possible here. In-

deed, the welfare programs involved here are statewise on their face, are required to be statewide by federal law (See Section B, *supra*) and have the same purposes in New York City and elsewhere in the state: meeting the basic needs of recipients. In meeting the basic needs of indigent families, the question to be asked is simply, is there any fair reason to provide persons in Nassau and Weschester counties, for for example, with less assistance than persons in New York City? The answer, as it emerged from the proof adduced below is clearly, no.

Finally, appellants argue (p. 41, Appellants' Brief) that: "In any event, as we have shown, the differential here was prompted by humane motives." The claim for "humane motive" is odd, indeed, when we recall that §131-a resulted in a drastic cutting of benefit levels of these appellees and those in New York City as well. While standards for New York City recipients were cut less drastically than for these appellees, that hardly establishes "humane motives" as the cause for the differential. Rather, appellants virtually admit the real motive has nothing to do with humane feelings. Appellants tell us that the statutory direction to cut suburban levels below New York City levels, and allowing local officials to apply for increase, "demonstrates the State Legislature's concern for the ability to pay off the various welfare districts since they would be required to pay one-quarter of any increase over the established levels." Saving money, and conceding to local Treasury interests, was the obvious and invalid motive: *Cf. Shapiro v. Thompson*, 394 U.S. 618, 633 (1969).

D. *The Limited Nature of the Preliminary Injunction*

The limited nature of the interlocutory decision here at issue itself demonstrates the careful and wise use of discretion by the Court below. As first stated in its opinion, 303 F. Supp. at 351[35] (A 120):

[35] The critical language in the order, "other than according to objective, non-discriminatory standards based upon the cost of the needs of such recipients", is identical. See (A 125).

> "Accordingly, plaintiffs' motion for preliminary relief granted to the extent that pending trial and final determination of the action defendants will be restrained from further enforcement or implementation of 131-a of the New York Social Services Law, or from promulgating schedules of grants and allowances of public assistance, or making payments to recipients, *other than according to objective, nondiscriminatory standards based upon the cost of the needs of such recipients.* Trial of the action will commence on October 6, 1969 at 10:00 A.M. Defendants' motion for summary judgment is denied." (Emphasis supplied).

The preliminary injunction at issue to be sure, does prohibit the appellants from paying smaller grants to welfare recipients in Nassau or Yonkers upon the speculation that welfare recipients who live in Queens or the Bronx have a greater subjective need to travel more frequently to museums or clinics. But as can readily be seen, it does not specify the raising of levels of allowances or dictate what the particular schedules for persons in New York City or the suburban counties shall be. It merely requires that the grants paid be based upon standards arrived at by consideration of objective costs of similar items of need.

The preliminary order, it should be noted, was signed September 12, 1969. The trial was set for October 6, 1969. Before trial—and certainly during trial—appellants were free to present to the court any evidence whatsoever that costs of any of the items included in the schedules of allowances were in fact higher in New York City than in Nassau, Westchester or the other suburban counties. Indeed, the court's preliminary order is so phrased as to make it possible for appellants to pay differential allowances based upon objective studies demonstrating differences in costs of items included within the schedule of allowances without requesting permission of the court below. Such differentials would be consistent with the statutory requirement of uniformity.

Yet the appellants sought to present no such evidence to the court below. Nor have the appellants sought to implement an objective study which itself would justify a differential in payment. Nor did the appellants seek a final determination upon the trial (in which they might present evidence of their claims that welfare people in Queens and the Bronx have "higher social aspirations" than people who live in Nassau and Yonkers). Instead they brought an appeal to this Court, challenging the district court's discretion to issue its limited and carefully phrased injunction. Thereafter as we discussed earlier in this point, appellants raised before this Court for the first time certain apparently frivolous afterthoughts as to different needs in New York City.

We submit that the limited nature of the preliminary injunctions, the ready availability of a trial forum through which appellants and appellees could have reached a final adjudication of their contentions and in which appellants could have presented evidence of their new post-preliminary injunction claims, are all factors indicating the proper use of discretion to the court below. The trial, as a forum in which any new claims by appellants can be fully heard and examined, is still available and awaiting appellants.

POINT II

The Doctrines of Exhaustion, Ripeness, and Abstention Have no Applicability in the Circumstances of This Case; the District Court Was Correct in Proceeding To Determine This Claim.

It is by now established beyond peradventure that an individual pressing a claim under 42 U.S.C. § 1983 is not required to exhaust state remedies before proceeding with an action in federal district court. *King v. Smith*, 392 U.S. 309 (1968); *Damico v. California*, 389 U.S. 410 (1967); *McNeese v. Board of Education*, 373 U.S. 668 (1963). "The federal remedy [§ 1983] is supplementary to the state remedy, and the latter need not be first sought and refused

before the federal one is invoked." *Monroe v. Pape*, 365 U.S. 167, 183 (1961), for it "would defeat [the] purposes" of § 1983 to hold "that assertion of a federal claim in a federal court must await an attempt to vindicate the same claim in a state court." *McNeese, supra*, 373 U.S. at 672.

Perhaps recognizing the futility of arguing the exhaustion question directly, appellants have attempted to disguise what is inevitably a contention that exhaustion should be required by speaking of ripeness and abstention. Neither of these doctrines, however, is applicable on the facts of this case.

Appellants argue that federal adjudication of the plaintiff-appellees' claim was "unripe" because "§ 131-a itself contains a plenary remedy" the use of which might conceivably eliminate the challenged payment differential. Appellants' Brief, p. 17. The remedy suggested consists of proceeding under Article 78 of the Civil Practice Law and Rules in the nature of mandamus either to compel a social services district to apply to appellant Wyman under § 131-a(4) for an increase in its level of payments or to compel appellant Wyman to render a decision on an application already made. Appellants' Brief, pp. 17-18.[36] In this connection appellants rely on the district court opinion in *Rosado v. Wyman*, 304 F. Supp. 1354 (E.D.N.Y. 1969), in which the

[36] §131-a(4) provides: "4. Provided it accords with federal requirements, the regulations of the department shall provide that the commissioner, with respect to any social services district to which subdivision three applies, may promulgate a schedule of monthly grants and allowances for greater or lesser amounts than established by the regulations of the department applicable to such district, but not to exceed the maximums prescribed by subdivision two, for all items of need exclusive of shelter and fuel for heating, if it is established that in such district the total cost of the items included in the schedule applicable to such district actually is more or less, as the case may be, than the cost thereof reflected in such schedule. A social services official may, with the approval of the appropriate local legislative body, make application to the department for the promulgation of a schedule pursuant to this subdivision."

payment differential between New York City and its surrounding counties was initially challenged. After that case was brought, subsection (4) was added to § 131-a by the New York State Legislature, in light of that development, although it considered itself to have been properly convened, 304 F. Supp. at 1355, the three-judge court dissolved itself on the ground that:

> "any attack on the newly adopted subdivision would not be ripe for adjudication by this Court until there has been opportunity for action by state officials and until the matter comes before this Court in an appropriate proceeding." 304 F. Supp. at 1356.

Appellants' reliance on *Rosado* is entirely misplaced. The *Rosado* court did not hold that the challenge to the differential was "unripe" because plaintiffs had failed to pursue a questionable state remedy. Rather it found that federal consideration of the disparity should be postponed until appellant Wyman had promulgated or had a chance to promulgate new payment schedules. In short, appellant Wyman was given an opportunity to eradicate the challenged disparity. When appellant Wyman in fact did act, by promulgating on June 5, 1969, a statewide schedule of allowances with immediate impact that failed to eliminate the differential between New York City and the surrounding counties, any reason for considering the issue unripe for adjudication disappeared. Appellants' reliance on *Schuman v. State of New York*, 270 F. Supp. 730 (S.D.N.Y. 1967), Appellants' Brief, p. 19, demonstrates the bankruptcy of their ripeness contention. In that case the district court held that until a prosecution under a state statute was actually initiated, a federal challenge of that statute was unripe. Had the state authorities acted there, as appellant Wyman acted here when he promulgated statewide payment schedules, the issue would have been actual and ripe, not hypothetical. The purpose of the ripeness requirement in this context is to give a state official a chance to correct or avoid, of his own accord, a conflict with federal law. When official action is taken with direct impact on individuals, no longer is the matter "unripe."

Appellants mistakenly assert that the validity of the disparate grants is not a "ripe" issue until literally endless efforts have been made to persuade appellant Wyman to equalize grant levels. Appellants' Brief, pp. 19-20. Ripeness does not depend upon immutability of the regulation but rather upon whether the regulation is likely to affect, or in fact has affected, the claimants before the federal court.[37] Thus the district court in this case properly found that

> "The situation has changed substantially since the three-judge court in *Rosado v. Wyman* dissolved itself on the ground that the issue now before this Court might be rendered moot by administrative action. Administrative action now has been taken and it has failed to moot the issue." 303 F. Supp. at 350.[38]

Requiring, as appellants would, that welfare recipients press their challenge to the discriminatory payment schedules in the state courts in the hope that adjudication by the federal courts would become unnecessary amounts to requiring them to exhaust state judicial remedies. As noted above, this Court has unqualifiedly rejected the proposition

[37] Appellants erroneously state that the district court invalidated 91.31-a. What the court actually did was invalidate "the differential between allowance levels established for welfare recipients in New York City and those in surrounding counties." 303 F. Supp. at 347. That differential was embodied in a state-wide regulation, 18 NYCRR § 352.4, promulgated by appellants.

[38] It is interesting to note that Judge Hays, who concurred in the opinion below, wrote the opinion of the Second Circuit on the ripeness issue in *Rosado*, in which he found that the three-judge court "was right in refusing to act on facts that were fluid and subject to early change." 414 F. 2d at 175. His concurrence in Judge Mansfield's opinion is consistent with his view that the issue before the three-judge court in *Rosado* was "premature." *Id.*

that state remedies must be exhausted in suits brought under 42 U.S.C. § 1983.[39]

Appellants also invoke the doctrine of abstention, arguing that "the District Court effectively denied the state courts any opportunity to interpret this new statute." Appellants' Brief, p. 20. However, since the meaning and applicability of the challenged regulation is entirely clear, the doctrine of abstention is entirely inapposite to this case. It is only where a state court interpretation of a statute of uncertain meaning or vague applicability might render federal adjudication of the federal claims unnecessary that abstention comes into play. See, *e.g.*, *Zwickler v. Koota*, 389 U.S. 241 (1967); *Harrison v. NAACP*, 360 U.S. 167 (1959). As this Court has noted, federal courts may abstain where

> "the unsettled issue of state law principally concerned the applicability of the challenged statute to a certain person or a defined course of conduct, where

[39] "Indeed, there may be no state judicial remedy that is available to individual welfare recipients. Contrary to appellants' assertion, Appellants' Brief, p. 21, there are no remedial provisions or private remedies contained in § 131-a(4). While the three-judge court opinion in *Rosado* implies the contrary, such remedies are at best speculative. Cf. *Holmes v. New York City Housing Authority*, 398 F. 2d 262, 267 (2d Cir. 1968). Section 131-a(4) merely empowers appellant Wyman to implement new schedules either unilaterally or upon the request of local social services districts. In fact, appellants ask that appellees bring a proceeding to compel a decision on Nassau County's pending application to appellant Wyman and/or to compel another social services district to apply to appellant Wyman; in either case, appellees have no direct remedy against the Commissioner. Moreover, § 131-a(4) appears to require the exercise of *discretion* by the Commissioner; it is arguable that an Article 78 proceeding may not be brought to compel an administrator to perform other than an administrative duty. See CPLR § 7803(1). Litigants may not be required to pursue remedies that are in fact unavailable to them. 1 Jaffe, Judicial Control of Administrative Action 424 (1965). Cf. *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967); *Rosado v. Wyman*, U.S. , 42 U.S.L.W. 4266, 4268 (1970).

> resolution in a particular manner would eliminate the constitutional issue and terminate the litigation." *Baggett v. Bullitt*, 377 U.S. 360, 376-77 (1963).

The state regulation at issue here, 18 NCYRR §352.4, imposes schedules of disparate allowances that are not subject to interpretation or construction that could remedy the uneven treatment. The clear written provision of, for example, $191 per month for one family of four as against $208 for another family of four, is clear on its face. No court interpretation of these schedules could eliminate the differential challenged. *Baggett v. Bullitt, supra. Cf Harrison v. NAACP, supra.*[40] Hence, resort to state courts would be futile where the Regulation's defect cannot be corrected by "interpretation." The dollar levels, the specific persons affected, the prohibition on exceeding the maximums set are disclosed on the face of the statute and regulation, the district court need not have abstained to a state court where no conceivable interpretation could have eliminated the defect challenged.[41] It is this obvious that appellants are once again asking only that the state courts be given an op-

[40] Heavily relied upon in appellants' brief at p. 20, 21, this case required abstention where the plaintiffs attacked five Virginia statutes which were indefinite in their impact and meaning, and which the court specifically said "might well be read as valid" and "not even apply[ing]" to these appellees. 360 U.S. 177. No such interpretation, or one that would make the differential vanish or the allowances not apply to the appellees, is even suggested by the state herein.

[41] As noted by Justice Douglas in his concurring opinion in *Reetz v. Bozanich, supra*, "the state courts . . . are no more competent to decide the federal question than are the federal courts. The terms of the New York statute [N.Y. §131(a)(4)] are clear, and there is no way in which a state court could interpret the challenged law in a way which would avoid the statutory claim pressed here." 38 U.S.L.W. at 4274. The very same New York statute is at issue here, and while the federal claims are different from the claim discussed by the Supreme Court in *Reetz*, the New York statute is no more susceptible here than in *Reetz* of a state court interpretation that would avoid the federal claims.

portunity to moot appellees' federal claims, which amounts to asking appellees to fulfill the discredited requirement of exhaustion of state remedies before pursuing their federal claims in the federal courts.

CONCLUSION

For all of the above reasons, the orders of the lower court providing preliminary injunctive relief *pendente lite* should be affirmed.

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Supreme Court of the United States

OCTOBER TERM, 1969

No. 896

GEORGE K. WYMAN, as Commissioner of the Department of Social Services of the State of New York, and the DEPARTMENT OF SOCIAL SERVICES OF THE STATE OF NEW YORK,

Defendants-Appellants,

—against—

EDNA ROTHSTEIN, SYLVIA MILLER, HENRIETTA BATSON, CATHERINE JONES and DOLORES HARVANEK, as individuals and on behalf of all other persons similarly situated,

Plaintiffs-Appellees.

BRIEF *AMICI CURIAE* OF THE CENTER ON SOCIAL WELFARE POLICY AND LAW AND THE COUNTY OF NASSAU

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In the

Supreme Court of the United States

October Term, 1969

No. 896

George K. Wyman, as Commissioner of the Department of Social Services of the State of New York, and the Department of Social Services of the State of New York

Defendants-Appellants

against

Edna Rothstein, Sylvia Miller, Henrietta Barnes, Catherine Jones and Dorothy Hansen, as individuals and on behalf of all other persons similarly situated,

Plaintiffs-Appellees

BRIEF *AMICI CURIAE* OF THE CENTER ON SOCIAL WELFARE POLICY AND LAW AND THE COUNTY OF NASSAU

Interest of *Amici Curiae*

The Center on Social Welfare Policy and Law is the specialized welfare law resource of the Legal Services Program of the Office of Economic Opportunity. Affiliated with the Columbia University School of Law, the Center

The Center on Social Welfare Policy and Law files this brief pursuant to Rule 42(4) of the Rules of the Supreme Court, written consent of the parties having been filed with the Clerk. The County of Nassau files this brief pursuant to Rule 42(4)

undertakes research pertaining to the legal rights of welfare recipients and supports OEO-funded legal services programs and other legal organizations through education and assistance in the preparation of important litigation. It also maintains the nation's only comprehensive private collection of state public assistance regulations and manuals. Attorneys from the Center have appeared before this Court this term in *Goldberg v. Kelly*, 38 U.S.L.W. 4223 (March 23, 1970); *Barton v. Collins*, 38 U.S.L.W. 4195 (March 2, 1970); and *Rhoades v. Henry*, 38 U.S.L.W. 4261 (April 6, 1970), and have submitted briefs amicus curiae in *King v. Smith*, 392 U.S. 309 (1968); *Shapiro v. Thompson*, 394 U.S. 618 (1969); *Wheeler v. Montgomery*, 38 U.S.L.W. 4251 (March 24, 1970); *Simmons v. Housing Authority of Fall River*, cert. filed, 1969, No. 81; *Riddle v. Connecticut*, cert. filed, 1969, No. 905; *Sinks v. Gregory*, cert. filed, 1969, No. 200; *Rhodes v. Rhoades*, 38 U.S.L.W. 4277 (April 6, 1970); and *Lewis v. Martin*, cert. filed, 1969, No. 829.

The Center has a continuing concern with questions involving the administration of state plans under the federally aided public assistance programs, and with the enforcement of federal law as it applies to such plans. It is particularly interested in questions of fairness in the establishment of the amounts of the grants paid to public assistance recipients under the federal programs.

The County of Nassau, located on Long Island just outside the boundaries of New York City, is one of the suburban counties whose public assistance recipients have been adversely affected by the payment differential here at issue. The County's population of 1,428,838 includes approxi-

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Attorneys for the Center participated in proceedings in this case in the District Court but are not involved in this appeal.

mately 40,000 public assistance recipients, with whose welfare the County government is vitally concerned. The County is particularly concerned with protecting its welfare population from discriminatory treatment imposed on the basis of their place of residence, by state statute and regulation. Because it is aware that the cost of living for Nassau County residents is at least as great as that for New York City residents and because it wishes to provide support for its residents who appear as appellees, the County joins in the filing of this *amicus* brief.

Amici completely agree with appellees' position that New York State has denied them the equal protection of the laws to which they are entitled, and this would urge the Court to affirm the decision of the statutory court, which so held. Amici, however, firmly believe that the injunction issued below was equally required by certain fundamental principles embodied in the Social Security Act. In view of the cursory treatment given to the federal statutory question by the court below, as well as by appellants in their brief to this Court, the County and Nassau County believe that their function as amici curiae would best be served by presenting to this Court the full range of statutory issues raised by this case, in recognition that this Court properly seeks whenever possible to avoid unnecessary constitutional adjudication.

Summary of Argument

I.

Each of the public assistance titles of the Social Security Act contains three so-called statewideness requirements: that the public assistance program be in operation throughout the state, that it be administered or its administration supervised by a single state agency, and that there be state financial participation. The concrete implications of the statewideness requirements in light of the historical background and legislative history of the Social Security Act, as well as its interpretation and application by the Department of Health, Education, and Welfare, are that those items of subsistence comprising a state's standard of need must apply equally to all localities within the state and that geographical variations in the amount of grants paid within the state are permissible only if based on objective differences in the cost of some or all of those items.

The differential in grant levels challenged here, under which recipients living in the suburban counties surrounding New York City receive lower amounts than recipients living in the City proper, violates the federal statewideness requirements by not being based on objective cost differences in items of need recognized throughout the state. Its most plausible basis, and one urged by appellants, is the reluctance of many counties outside the City to contribute the local share of increased grant amounts, a basis explicitly prohibited by federal regulation. Even were such considerations valid under the Act, the appearance of Nassau County as amicus demonstrates the unfairness inherent in grouping those counties unwilling to bear

their share of welfare cost—together with those counties, such as Nassau, that are willing to recognize the needs of their welfare population. The justification of the challenged differential by appellants in terms of the "social cost of urban living" becomes on analysis a reflection a past administrative practices under which grants for special needs had been more freely given in New York City than elsewhere in the state and under which the City had been the subject of a demonstration project pursuant to which certain special needs had been budgeted on a recurring basis. The fact that the grant differential reflects past practices in the City regarding special needs means that such needs are at least partially being recognized as to City residents while being totally unrecognized as to those living elsewhere, in violation of the federal requirement that a state's standard of need contain the same items as to all localities. Finally, the particular cost differences advanced by appellants have no basis in any objective data, a violation of the federal requirement that differences in grant levels within a state be based on facts.

II

The district court should have adjudicated the statutory claim without waiting for a ruling from HEW. In *Rosado v. Wyman*, —— U.S. —— (April 6, 1970), this Court held that, since welfare recipients have no procedure whereby they may obtain a determination of their claims from HEW, there is no basis for denying them a prompt federal court adjudication. The merits of the statutory claim are thus properly before this Court. Even if the Court determines that HEW's views should be considered before statutory claims are resolved by the courts, the preliminary injunctions should still be affirmed. By letter to appellant

Wyman, the HEW Regional Commissioner has indicated that New York does not have a statewide standard being applied uniformly throughout the state.

I.

The differential in grant schedules between New York City and its surrounding counties violates the Social Security Act's requirement of statewide uniformity.

It is a well-established jurisdictional tenet that this Court will avoid deciding a question of constitutional validity if construction of a statute can be equally dispositive of the case before it. E.g., *Harmon* v. *Brucker*, 355 U.S. 579 (1958). Thus this Court in *King* v. *Smith*, 392 U.S. 309 (1968), in affirming the district court's finding of invalidity as to Alabama's substitute-father rule, rested its judgment on a construction of the Social Security Act and declined to consider the equal-protection ground advanced below. Indeed, in *Rosado* v. *Wyman*, —— U.S. —— (April 6, 1970), this Court noted that under *King* v. *Smith* a district court is "obligated to adjudicate [the] statutory claim in preference to deciding the original constitutional claim." Slip op. at 3. The instant case presents another opportunity for affirming the decision below without reaching the constitutional question; as *amici* intend to demonstrate, the considerations that led the district court to its holding under the Equal Protection Clause apply with equal force to certain fundamental principles embodied in the Social Security Act. Moreover, as demonstrated in point II, the district court's reluctance to treat this statutory issue was entirely without foundation.

A. Federal law and regulations require that public assistance grants reflect the same items of need in all subdivisions of a state and that differences in grant amounts reflect objective differences in the cost of items of need.

Titles IV and XVI of the Social Security Act require, in identical language, that a state plan for aid to families with dependent children or for aid to the aged, blind, or disabled must

> "provide that it shall be in effect in all political subdivisions of the State, and, if administered by them, be mandatory upon them." §§ 401(a)(1) and 1602(a)(1) of the Act, 42 U.S.C. §§ 602(a)(1) and 1382(a)(1).

This requirement of statewide operation of public assistance plans is buttressed by the further requirements that there be state financial participation in such plans, §§ 402(a)(2) and 1602(a)(2) of the Act, 42 U.S.C. §§ 602(a)(2) and 1382(a)(2), and that there be a single state agency either to administer such plans or to supervise their administration, §§ 402(a)(3) and 1602(a)(3) of the Act, 42 U.S.C. §§ 602(a)(3) and 1382(a)(3).[3]

The concrete meaning of statewideness in public assistance administration can best be drawn in light of a consideration of the historical backdrop to and the legislative history of the entry of the federal government into the public assistance field. This consideration ultimately leads

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[3] The provisions in Title IV relate to Aid to Families with Dependent Children (AFDC), those in Title XVI, to the combined program of Aid to the Aged, Blind, or Disabled (AABD), which has been adopted by New York State. Identical provisions also appear in Title I, Old Age Assistance (§ 2(a) of the Act, 42 U.S.C. § 302(a)); Title X, Aid to the Blind (§ 1002(a) of the Act, 42 U.S.C. § 1202(a)); and Title XIV, Aid to the Permanently and Totally Disabled (§ 1402(a) of the Act, 42 U.S.C. § 1352(a)).

to the conclusion that the statewideness requirements mean that those items of need that make up a state's standard of need must be identical in all parts of the state and that differences in grant amounts based on the place of residence of the recipients must represent only differences, objectively determined, in the cost of items comprising the standard of need. As we shall explain below, appellants have not complied with these requirements.

Prior to the assumption by the federal government in 1935 of primary responsibility in the field of public assistance, public aid to the poor was a matter entirely of state and local concern. The implications of this fact in terms of unequal treatment of equally needy individuals within a state formed an important part of the legislative context in which the Social Security Act of 1935 was enacted. One of the primary purposes of federal involvement in public assistance was the elimination of the discretionary power of local officials that had frequently resulted in irrational intrastate differences in amounts of assistance paid to equally needy individuals.

Thus the President's message recommending legislation on economic security noted that the application of state old-age pension laws was often optional on the part of counties and that such assistance was financed almost entirely with local funds. Message of the President Recommending Legislation on Economic Security, H.R. Doc. No. 81, 74th Cong., 1st Sess. 22 (1935). The presidential Committee on Economic Security noted that the effectiveness of old-age pension laws depended largely on the extent of state involvement in administration and financing. Social Security Board, *Social Security in America, A Summary of Staff Reports of the Committee on Economic Security* 161, 163 (1937). Thus the Committee

recommended that responsibility for administration of assistance to the aged be centralized within the state so as to "avoid a diversity of operating standards in the subdivisions within the states." *Id.* at 191.

As to aid to needy children, the situation was similar. Most state laws were only permissive, and even in states with mandatory laws it was common for particular counties to be either unwilling or unable to make assistance payments at all. Financing was almost entirely local. Douglas, *Social Security in the United States* 186-87, 192 (1936); *Social Security in America, supra,* at 234. See also Message of the President, *supra,* at 30; H.R. Rep. No. 615, 74th Cong., 1st Sess. 10 (1935); S. Rep. No. 628, 74th Cong., 1st Sess. 17; Abbott, *From Relief to Social Security* 274 (1966). Thus in Illinois in 1934, for example, some counties did not participate at all in that state's mother's aid program, while those that did made payments ranging from a low of $19 per child per year to a high of $274. *Id.* at 209-10.

It was in light of this fact of gross intrastate inequalities in public assistance payment levels that the President proposed and Congress enacted the requirements of statewide operation, state financial participation, and a single state administrative agency as conditions for the receipt of federal funds for public assistance under the Social Security Act. Of all provisions of the Act, these three have been characterized as having had "the greatest effect upon the organization and administration of public welfare agencies in the states." Brown, *Public Relief, 1929 to 1939* 350 (1940). When the program of Aid to the Permanently and Totally Disabled was added to the Act in 1950, P.L. 734, 81st Cong., 64 Stat. 477 (1950), and when the combined program of Aid to the Aged, Blind, or Disabled was enacted

in 1962, P.L. 87-534, 76 Stat. 172 (1962), the three statewideness requirements were inserted in those titles as well.

It was established at the outset of administration of the Act that the statewideness requirements mandate statewide uniformity in standards of assistance. Rejecting the argument that the requirement of statewide operation did not imply uniform statewide standards,

> "[t]he [Social Security] Board [predecessor of HEW] point[ed] out that uniform standards did not mean uniform payments, if the cost of living varied throughout the state, but only that persons with the same resources and needs should be treated the same. Actually, it was demonstrated in the course of time that the wide variations in payment within a state bore little relationship to variations in the cost of living. In fact, it was discovered that with the exception of rent, the variation in the cost of living was surprisingly small throughout a state, even between rural and urban areas." Altmeyer, *The Formative Years of Social Security* 81 (1968).

Treating alike "persons with the same resources and needs" implies that the same needs will be met as to such persons throughout the state; that the budgetary components that comprise a public assistance grant will be the same in each case; and that differences in grant levels are permissible only to reflect differences in the cost of the component items that comprise the public assistance grant.[4] This is made abundantly clear in current regula-

[4] Differences in the items included in the standard of need may properly be based on different needs individually determined; thus in some states, differences in grant amounts are attributable to recognition of items of special need, such as medically mandated diets, recognition of which results in an increase in the grant.

tions of the Department of Health, Education, and Welfare. HEW has interpreted the statutory requirement of statewide operation of a public assistance plan to mean that "State policies, standards and methods will apply equally to persons in like situations wherever they may live"; more particularly, "the specific eligibility factors for each assistance program, including resources and standards of need, . . . are uniformly applied in area offices or political subdivisions." Dept. of Health, Education, and Welfare, *Handbook of Public Assistance Administration* [hereinafter "HEW *Handbook*"], Pt. II, § 4300. The requirement that a single state agency administer or supervise the administration of public assistance programs is designed to insure that an administrative unit of statewide authority "is accountable for insuring that funds will be available in all political subdivisions for assistance payments and for operation of the program on a uniform basis." *Id.*, § 2300. Finally, the requirement of state financial participation in public assistance programs implies that "State and Federal funds will be apportioned among the political subdivisions on a basis consistent with equitable treatment of individuals in similar circumstances throughout the State." *Id.*, § 3200.3. The three plan conditions thus contemplate that public assistance plans will be characterized by statewide uniformity and that all applicants and recipients within the state will receive the same treatment at the hands of the public assistance system regardless of their place of residence.

New York, however, eliminated special grants with the enactment of § 131-a, and thus the issue of differences in the need standard based on individual differences in need does not arise in this case. It should be noted that HEW requires that states recognizing special needs include in their state plan a description of those needs and the circumstances under which they will be met. 45 C.F.R. § 233.20(a)(2)(v), 34 Fed. Reg. 1394 (1969).

The primary purpose of both public assistance titles here at issue is to furnish financial assistance to needy individuals and families, §§ 401 and 1601 of the Act, 42 U.S.C. §§ 601 and 1381, and the most critical aspect of public assistance for its beneficiaries is the level of assistance they receive. Accordingly, the most important implication of the requirements of statewide operation, a single state agency, and state financial participation is found in their relation to the method of establishing standards of assistance. HEW in this connection has established the requirement that state plans for public assistance must "[p]rovide that the determination of need and amount of assistance for all applicants and recipients will be made on an objective and equitable basis"; state plans further must "[s]pecify a statewide standard, expressed in money amounts, to be used in determining (a) the need of applicants and recipients and (b) the amount of the assistance payment," which standard must "be uniformly applied throughout the State." 45 C.F.R. § 233.20(a)(1), (2), 34 Fed. Reg. 1394 (1969).

HEW has advised the states that "any variation in cost standards by areas within a State must be justified by facts." Dept. of Health, Education, and Welfare, *Simplified Methods for Determining Needs* 1 (1964), and that such facts must be "objective." 45 C.F.R. § 233.20(a)(1), 34 Fed. Reg. 1394 (1969).

The application of these principles in the concrete New York situation was succinctly stated in a recent letter from HEW to appellant Wyman:

> "[T]he State standard must represent items of need to be made available to all recipients statewide. Differences in money amounts, if they exist, must result from demonstrable differences in the cost of these items in

various sections of the State." Letter of November 10, 1969 from HEW Regional Commissioner James Callison (A. 174).[5]

B. New York's payment of lower benefit amounts to public assistance recipients in counties surrounding New York City than to those in the City is not based on demonstrable differences in cost of items included in a statewide standard of need.

Appellants have acknowledged the most plausible but most patently impermissible explanation for the fact that public assistance recipients in counties surrounding New York City receive lower benefits than those paid in the City. They argue that the payment differential

> "demonstrates the State Legislature's concern for the ability to pay of the various welfare districts since they would be required to pay one-quarter of any increase over the established levels." Appellants' Brief at 38.

Such a consideration, of course, is precisely the evil at which the federal statewide uniformity requirements are directed, for it was precisely the inability to pay on the part of many localities that created the wide variations in grant levels characteristic of the mothers' aid and old-age pension programs prior to 1935. HEW has explained the "underlying objectives" of the requirement of state financial participation in public assistance plans, §§ 402(a)(2) and 1602(a)(2) of the Act, 42 U.S.C. §§ 602(a)(2) and 1382(a)(2), as being

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[5] Numbers in parentheses preceded by "A." refer to pages of the Appendix.

> "(a) to assure a broader base of financial support of the programs than would be possible if only local funds were used, thus guarding against placing upon the political subdivisions of a State undue burdens for financing public assistance; and (b) under State supervision, to facilitate Statewide maintenance of the standards of each State plan." HEW *Handbook*, Pt. II, § 3300.

HEW goes on to note that "The varying and sometimes limited tax resources of a local government could, if not equalized by State and Federal funds, result in inequitable provision for assistance and administration among localities within a State." *Id.* Thus appellants' reliance on the presumably unequal "ability to pay of the various welfare districts" as a justification for the challenged payment differential flies in the face of the state's responsibility, under federal law, to assure that such varying abilities to pay on the part of localities do not operate to the detriment of the ultimate beneficiaries of public assistance.

Appellants have surrounded their fiscal argument with a number of other asserted justifications for the challenged payment differential but have failed to show cost differences between the two areas involved that justify the payment differential. At best, the justifications advanced by the state are a verbal smokescreen proving nothing. At worst, they prove only that the reason for the payment differential is the inclusion of certain items in the standard of need for City recipients that are not included in the standard applied to those in the surrounding counties.

I. There are in fact no demonstrable differences in living costs between New York City and the surrounding counties.

Prior to March 1969, New York well understood its obligation to vary payments only as the cost of meeting need varied throughout the state:

> "A principal consideration in determining the adequacy of assistance and care shall be the sufficiency thereof for maintenance in accordance with standards of public health in the community with due regard for variations in cost from time to time and between localities." N.Y. Soc. Serv. L. § 131(3) (emphasis added).

Pursuant to this policy and to his authority under former § 131 to establish grant schedules, appellant Wyman had divided the state for payment purposes into three geographical areas. Nassau and Westchester Counties, along with five other suburban counties, were included in a single payment area with New York City, known as SA I (A. 41, 50). A cost study carried out in May 1968 had formed the factual basis for grouping the suburban counties in the same payment area as New York City (A. 50). The only difference in payment levels in other geographical areas of the state was for objectively verified differences in utility rates (A. 41).

No further cost study had been made at the time § 131-a (the provision here under attack) was enacted in March 1969 (A. 51-52); yet the Legislature in enacting § 131-a removed the suburban counties from former SA II and placed them with the rest of the state in a new payment area. Nor had a further cost study been made at the time appellant Wyman acted in June 1969 to create a new pay-

ment area for the suburban counties that had the effect of narrowing but not closing the gap between benefits paid in such counties and those paid in New York City (A. 55).

Thus the combined effect of § 131-a and the administrative action taken by appellant Wyman thereunder was to treat New York City as being *sui generis*,[6] despite the fact that the only available objective data demonstrated that there was no variation in the cost of living as between New York City and its surrounding counties. Indeed, the entire metropolitan area has been treated as a single economic unit by the Labor Department's Bureau of Labor Statistics in its compilation of various cost schedules on which appellants have in the past in part relied. 303 F. Supp. at 344, n. 4.

As recognized by the court below, appellants' unsupported notions are based on a stereotypic view of the life style of the poor in the metropolitan counties surrounding the City that can only be characterized as an "unreal one":

> "The picture of suburban welfare recipients living in garden apartments (the term used in oral argument),

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[6] Appellants make much of the various ways in which New York City is unique. While we have no desire to denigrate the City's uniqueness for many purposes, we fail to see the relevance to the issue before this Court of, for example, the greater crime rate in the City, Appellants' Brief at 28; the treatment of the City as a separate entity for purposes of the Multiple Dwelling Law or the Code of Criminal Procedure, *id.* at 39, or the fact that welfare recipients in the City are both more numerous and are members of minority groups more frequently than elsewhere in the state, *id.* at 35. The mention of these factors has a distinct ring of afterthought and is unsupported by any data relating any of them to a differential between the City and its surrounding counties in the cost of purchasing items of subsistence, which is the only class of differential that would justify the differential in levels of public assistance payments.

> located on the edge of a park . . . ignores the existence of many rundown tenements in the slum districts of our surrounding suburban counties, which unfortunately provide the principal housing facilities for welfare recipients." 303 F. Supp. at 349.

More particularly, the official view of living conditions for the poor in metropolitan counties ignores such facts as the following, offered by the Congressman whose district includes Westchester County:

> "'Yonkers, the state's fourth largest city [located in Westchester], has badly deteriorated housing, poor Negro and Puerto Rican populations, and terrible school problems—the whole complex of urban ills,' he says. 'And there's real poverty in some of the towns and villages.'" "Westchester: The Land of Let's Pretend," *New York*, Vol. 3, No. 6, 24, 26 (Feb. 9, 1970), quoting Rep. Richard L. Ottinger.

Although "[m]any people in the county like to think of Yonkers as an atypical cesspool, really an extension of New York City," there are other communities in the county also exhibiting signs of urban decay: "The towns settled along the Penn Central's Hudson division are all infested by rotting dwellings, inhabited by the poor population that each community has but prefers not to see." *Id.* at 28.

When pressed on the facts, appellants must admit that there was no basis for the differential established by § 131-a. In an earlier case this term, they assured this Court that the items included within the standard of need for public assistance recipients "have not been altered" by § 131-a, their cost has just been recalculated. Respon-

dents' Brief at 55 in *Rosado* v. *Wyman*, O.T. 1969, No. 540.[7] Yet allowances to meet that standard suddenly differ as to areas formerly treated alike, despite the absence of any new study demonstrating a difference in the cost of items included in the standard. Appellants here concede that what they term the "higher actual cost of living to metropolitan residents"[8] is "not reflected in item-by-item specifications in the standard of need." Appellants' Brief at 15. What they neglect to concede but what should be apparent is that no such specification would be possible because there is no evidence of any such variation whatsoever. There is nothing in the record, see 303 F. Supp. at 349, that offers a scintilla of factual evidence that the cost of any item of need is higher in New York City than in the suburban counties. (It should be noted that the one item of need for which a cost differential admittedly exists—housing—is not involved in this case. Housing costs are paid under a separate determination on the basis of actual cost to each recipient regardless of geographical location [A. 97].)

Appellants seek to gloss over this gap in the record by making much of the so-called "social cost of urban living" in New York City. This is primarily an attempt to justify inclusion within the standard of need applicable to New York City residents of certain items not included in the standard applicable elsewhere, a justification the impermissibility of which *amici* will demonstrate below. Ap-

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[7] This contention on the part of the state has recently been rejected by this Court. *Rosado* v. *Wyman*, *supra*, slip op. at 17.

[8] While under normal English usage a resident of Nassau or Westchester County would fall within the class "metropolitan resident," *i.e.*, a resident of the New York metropolitan area, it is clear that appellants are here referring to residents of New York City only.

pellants further contend, however, that this concept can be seen as encompassing higher costs of particular items of need that are recognized on a statewide basis.[9] They allege, for example, that sales taxes comprise a "substantial component" of the City's higher cost of living, Appellants' Brief at 28, but neglect to mention that sales taxes have always been budgeted in public assistance grants without being reflected in a differential in payment. Moreover, if sales taxes are an important factor in computing need, this factor should be reflected in varied payment levels between Nassau County (a 5% tax area), Westchester County outside of Yonkers (a 3% tax area), the Yonkers portion of Westchester County (a 5% tax area), and other counties upstate with sales tax rates ranging from 2% to 5%. Laundry costs and cleaning supplies, see Appellants' Brief at 16, had also been computed in the recurring grant under the prior schedules without being reflected in a payment differential (A. 47). Without any repricing since May 1968, it is impossible to imagine how it could objectively have been determined that the cost of these items in New York City had risen faster than their cost in surrounding counties. The costs of deterioration in housing, according to the only authority appellants cite, have become "capital losses" to owners, not to the welfare recipients who are their tenants. Appellants' Brief at 26-27. The state surely does not mean to imply that it is paying welfare recipients for losses accruing to third parties for which the recipients bear no liability.

[9] Appellants' arguments in this connection are addressed to the issue of equal protection, as were the findings of the court below. The question of whether the grant differential has any basis in objective differences in the cost of recognized items of need, however, is equally relevant, if not more so, to the question of conformity with the statewideness requirements of the Social Security Act.

The fact that there are no genuine cost differences as to New York City that justify payment differentials and that the present § 131-a violates statewideness requirements have most recently been affirmed by appellants themselves. New York's Governor has reported to the Legislature that "The [State] Board [of Social Welfare] has recommended the establishment of statewide standards of public assistance." New York Governor's Message to the Legislature 17 (1970). In response, the Governor has introduced legislation that would establish a single schedule of monthly grants applicable throughout the state. S. 7359, 1970 Legislative Session, introduced Feb. 9, 1970. This recommended legislation belies appellants' claims before this Court. Prior to May 1, 1969, the state's cost studies showed that New York City and surrounding areas should be in a single payment category and that statewide variations were dependent only on utility cost variations. The Governor's 1970 legislative proposal reaffirms the state's pre-1969 policy. No amount of squirming in appellants' brief can hide the fact that the state has consistently showed a different face out of court. The out-of-court position that there are no significant cost differentials is what this Court should rely upon.[10]

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[10] Not only has no showing been made that the Legislature and the Commissioner established higher payment levels for New York City on the basis of objectively determined higher costs in the City, the slim evidence in the record of cost differentials between the City and its surrounding counties points to greater costs as to the latter. The court below found, for example, that

> "the cost of transportation to recreational facilities, museums, beaches and hospitals in the surrounding counties, such as Nassau, is substantially greater than that incurred by New York City residents who are located closer to such facilities and have cheaper transportation available to them." 303 F. Supp. at 349.

2. *New York has established one standard of need for New York City and another standard for the rest of New York State.*

The two schedules of monthly public assistance allowances established by § 131-a, both "deemed to make adequate provision for all items of need," reflect a determination by the state to compute the allowances applicable to New York City residents on the basis of items of need not reflected in the allowances applicable to residents of the rest of the state. This determination also underlaid the administrative action taken by appellant Wyman when he exercised his authority under § 131-a to increase allowances as to counties surrounding New York City but continued to provide for a differential in grant amounts as between those counties and the City. Both in its legislative and administrative embodiment, this discrimination is clearly contrary to the federal dictates of statewide uniformity in the public assistance standard of need.

Appellants' major argument in support of payment differentials is that the bonus given New York City recipients represents "the nature of the urban crisis and the higher social cost of living in the metropolitan center." Appellants' Brief at 32; affidavit of Vernon Murphy (A. 93).[11] Appellant Wyman, when queried as to his justification for raising grant levels in the counties surrounding New York City so as to narrow but not close the gap in payments between those counties and the City, stated that the continuing differential represented

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[11] It is interesting to note that this explanation for the higher payment level as to New York City recipients was distilled from the application to HEW for approval of the cyclical grant experiment in New York City, a demonstration project that explicitly was not designed to increase benefit levels, see note 21, *infra*.

> "the complexities of urban living in the City of New York, the necessity for provision of transportation items on a regular basis, the fact that there are cultural opportunities, readily available transportation, community center facilities, and clinic facilities in New York City that are not available in other areas of the state to the same extent, certainly not the components of the urban living requirements." Deposition of Commissioner Wyman (A. 59).

In fact, as can be historically demonstrated, this "social cost of living" shibboleth is but a camouflage for the fact that certain items of need are being recognized as to New York City recipients but not as to recipients living elsewhere in the state.[12]

As pointed out above, the grant schedules in effect prior to the enactment of § 131-a divided the state into three geographical areas; variation in the amount of payments among the areas was attributable solely to differences in the cost of utilities (A. 41), and Nassau and Westchester Counties were included in a single payment area with New York City (A. 50). While the differences in the recurring grants for the three areas were quite small, see Appellants' Brief at 7, "actual average payments per recipient . . . were, because of a much greater frequency of special grants, substantially higher within New York City." *Id.* at 37. More specifically, higher payments for New York City recipients resulted

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[12] The unanimous district court found that

> "There is no evidence that the factor of 'social cost of living' . . . was considered by the Legislature at the time when it enacted § 131-a, and defendant Wyman testified that as far as he knew the Legislature did not have before it any evidence pertaining to the cost or use of such cultural activities." 303 F. Supp. at 344.

> "from the wide variety of practices of local districts regarding special grants, the availability of information in New York City, greater accessibility of welfare offices, the recipients' attitude toward welfare and their degree of organization, their resultant sophistication and willingness to take advantage of opportunities within the system." Affidavit of Acting Social Services Commissioner George W. Chesbro, *Rosado* v. *Wyman*, O.T. 1969, No. 540, Appendix at 98.

This is the "real differential," *id.* at 99, that was incorporated into the schedules established by § 131-a and then, by way of afterthought, given the ephemeral designation of "social cost of living."

The adoption of a standard of need based in part on variant local practices is a violation of the federal requirement that a state plan be administered uniformly. HEW *Handbook*, Pt. II, § 4300. The determination to add to City grants an amount representing this "real differential" was based not on objective differences in the cost of meeting certain universally recognized needs in New York City, but on the political activism of New York City recipients that had been reflected in a greater number of requests by such recipients for items formally available to all recipients.[13] Uniformity is intended to ameliorate local differences by requiring objective treatment of the needs of all recipients; New York has instead reinforced local differences by incorporating into the statutory scheme a differential reflecting the subjectivity of former administrative practices and political realities.

[13] As will be discussed *infra*, it is no answer to this fact to argue that recipients outside the City did not need these items.

When appellants go into detail in supporting the "social cost of urban living," it becomes clear that it is based, if on anything, on providing additional items of need for New York City residents. They say it is designed to satisfy the "higher level of aspiration" and "greater expectations" of City residents. Affidavit of Vernon Murphy (A. 94). It includes, as entirely new items in a standard of need applicable only to New York City, transportation to and use of available cultural opportunities, community centers, and clinical facilities (A. 59). Provision for recreational activity was never made under the prior standard of need (A. 60), and appellants have previously represented to this Court that the "items comprising the standard of need in New York have not been altered" by the enactment of § 131-a. Respondents' Brief, *Rosado* v. *Wyman, supra*, at 55. Yet appellants now offer these new items of need as the justification for the challenged differential in payment levels.

If cultural opportunities are a proper item of need in New York City (and we would most strongly urge that they are), they are no less a need of welfare residents outside the City. If anything, the greater cost of public transportation from Nassau County to cultural resources creates an even greater economic need for assistance in this respect. Appellants' rationale in the final analysis amounts to saying that where the cost of some items is substantial, the public assistance system will decline to pay for them and will justify that refusal by asserting that recipients in those areas do not have those needs. Appellants' Brief at 40. To say that certain facilities are "more available" in New York City than in Nassau or Westchester Counties (A. 59-60) is but to say that it is cheaper for the welfare system to pay for the use of those

facilities by New York City recipients than to pay for their use by suburban recipients. Rather than provide additional payments for use of such facilities by suburban residents, the state has simply ignored their cost as to such residents on the specious theory that they are simply not needed. This, we submit, is not a uniform statewide standard.[14]

The conclusion that the challenged payment differential is based on the addition of items of need for New York City residents is confirmed by an examination of the history of § 131-a. Prior to the adoption of § 131-a in March 1969, appellant Wyman had the duty under Social Services Law § 131 "to provide adequately for those unable to maintain themselves." He administratively established on a statewide basis the public assistance standard of need and level of benefits, which included a recurring grant for all recipients in the state to cover food, clothing, personal incidentals, household supplies, school expenses, utilities, laundry, and sales taxes (A. 92-93). In addition to those items represented by the recurring grant, the statewide standard also included special items of need available to any recipient in accordance with his or his family's particular requirements. Critical items for which special grants were provided included major clothing replacements,[15] home furnishings,[16] medically dictated diets,[17] tele-

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[14] The actual availability of recreational and cultural facilities in suburban counties as compared with New York City remains undocumented; appellant Wyman has conceded not having conducted any studies of the question (A. 60).

[15] Former 18 N.Y.C.R.R. § 352.4(c).

[16] Former 18 N.Y.C.R.R. § 352.5(j).

[17] Former 18 N.Y.C.R.R. § 352.4(b)(7), (8), (9).

phone service,[18] transportation,[19] certain educational necessities,[20] and expenses related to infancy.[21]

In 1968 a demonstration project was initiated under which special grants for clothing and furniture were eliminated as to recipients living in New York City. In their place a quarterly grant of $25 per recipient was added to the regular recurring grant. *Rosado* v. *Wyman*, *supra*, slip op. at 17. Approval of HEW under § 1115 of the Act, 42 U.S.C. § 1315, was required for institution of the demonstration project because without such approval the project would have violated the requirement of uniform statewide operation of public assistance plans (A. 52). HEW approval of this experiment was granted on the basis that the so-called cyclical grant would represent a different method, administratively less cumbersome than the special grant system, of meeting universally recognized needs. This was not a decision that certain needs of New York City recipients could be recognized while not being recognized as to recipients elsewhere in the state (A. 53).[22] That

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[18] Former 18 N.Y.C.R.R. § 352.5(i).

[19] Former 18 N.Y.C.R.R. § 352.5(p).

[20] Former 18 N.Y.C.R.R. § 352.5(d).

[21] Former 18 N.Y.C.R.R. § 352.4(e)(iv). The prior method of establishing individual need is discussed in *Rosado* v. *Wyman*, *supra*, slip op. at 17.

[22] The application for approval of the demonstration project submitted to HEW August 14, 1968 by the New York State Department of Social Services on behalf of the New York City Department of Social Services asserted that

> "It is clear that the introduction of cyclical payments for 'special' needs constitutes an innovation in the *administrative machinery and procedure* for processing special grants (as contrasted with the existing statewide plan) *rather than an*

is to say, recipients living outside the City were still eligible, on a showing of need, for special grants to cover the cost of clothing and furniture replacements. Appellants' Brief at 38. This Court has described the original grant experiment as a means of "accounting for basic and recurring items of need formerly subsumed in the special grant category by an averaging system." *Dandridge v. Williams*, *supra*, slip op. at 21. That opinion also refers to "special grants or the flat $100 grant" in a context in which they are clearly regarded as equivalent. *Id.* at 18. Indeed, HEW regulations specifically require that when a state's standard of need includes items of special need, the state public assistance plan must

> "(a) describe those items that will be recognized, and the circumstances under which they will be included, and (b) provide that *they will be recognized in the need determination for all applicants and recipients requiring them.*" 45 C.F.R. § 233.20(a)(2)(iv), 34 Fed. Reg. 1394 (1969) (emphasis added).

All special grants, including the experimental civilian grant, were eliminated with the enactment of § 131 a (A. 33). With the exception of rent and fuel for heating, which are separately budgeted, all items of need are now to be met by the basic semimonthly grant.

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increase in the level of *assistance payments*." (Emphasis in original.)

HEW's approval letter characterized the application as being a request "for waiver of Federal plan requirements specifically that of Statewideness." Letter of August 15, 1969 to Acting Commissioner Joseph W. Chesbro from HEW Regional Commissioner Joseph Callison.

Appellants use this loss of the cyclical grant as a justification for continued payment differentials. They explain the payment differential established by § 131-a as a recognition of the fact that City recipients by virtue of the cyclical grant experiment had received a higher recurring grant than that received by recipients elsewhere:

> "Thus, the Legislature was free to recognize that if in fact New York City and the rest of the State were treated equally, the City recipients would suffer a loss of income not suffered by the other recipients." Appellants' Brief at 33.

In other words, City residents were losing a fixed source of income—the cyclical grant—while other recipients were losing only an uncertain right to special grants. Since the cyclical grant amounted to $33.33 per month for a family of four and the new payment differential is $25.00 per month for the same family, the entire payment differential can be accounted for as partial compensation for the loss of the cyclical grant.[23] However, since appellants concede that "this cyclical grant replaced certain special grants which were available to recipients outside the City," *id.*, appellants' argument means that the new payment differential is designed to preserve a form of special needs payments to City residents while denying payment for those needs to all others. Such a result is precisely what the federal requirement of statewide uniformity of treatment

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[23] In fact, appellants seek to justify the payment differential on this basis. However, we note that contrary to their assertion that the $25 per month differential for a family of four is "precisely" the amount received by such a New York City family under the cyclical grant, Appellant's Brief at 33, the monthly amount attributable to the cyclical was $33.33, not $25.

is intended to preclude, because such a result means that the standard of need applied to City recipients differs from the standard of need applied to all other recipients.

• • • • •

If uniformity and objectivity have any meaning, they mean that undocumented stereotypes and impressionistic attitudes may not be used as predicates for differentials in the amount of bare subsistence grants. Appellants have by afterthought written a brief that attempts to justify geographic payment differentials. But their brief cannot disguise the fact that the federal mandate that "State policies, standards, and methods will apply equally to persons in like situations wherever they may live," HEW *Handbook*, Pt. II, § 4300, has been blatantly ignored.

II.

This Court should affirm the decision below on statutory grounds without awaiting a determination of the statutory issue by the Department of Health, Education, and Welfare.

The court below, having granted plaintiffs' motion for a preliminary injunction on constitutional grounds, declined to adjudicate their claim that the establishment of allowance schedules applicable to Nassau and Westchester Counties that were lower than those applicable to New York City violated the Social Security Act. It held:

> "Since the schedules and regulations adopted by defendants are now under review by that agency [HEW] which possesses considerable expertise with respect to its own regulations and should be entitled to interpret

them in the light of the complexity of problems presented by various welfare programs, see 45 C.F.R. § 233.20[a](1), *we at this stage defer determination as to the requirements of the Social Security Act in anticipation of a ruling by H.E.W.*" 303 F. Supp. at 351 (emphasis added).

In a recent decision this Court squarely rejected this mode of procedure for federal district courts. In *Rosado* v. *Wyman, supra,* the Court of Appeals had held that the district judge should not have exercised his jurisdiction since HEW was "engaged in a study" of the validity of New York's AFDC plan under a provision of the Social Security Act not in question here. 414 F.2d 170, 176 (2d Cir. 1969). This Court concluded that the district court had properly decided the federal statutory claim. It held that since welfare recipients are unable to "trigger and participate in" HEW proceedings, "there is no basis for the refusal of federal courts to adjudicate the merits of these claims." Slip op. at 8 and n. 8.

Accordingly, the statutory claim raised here should have been adjudicated by the court below and may lay the basis for this Court's decision in this case. See *King* v. *Smith, supra. Amici* thus urge that in view of the invalidity of § 131-a under 42 U.S.C. §§ 602(a) and 1382(a), as demonstrated in point I, the preliminary injunctions must be affirmed.

Even if this Court should decide that it would have been inappropriate for the district court to adjudicate the statutory claim without first obtaining HEW's views, *cf. Rosado* v. *Wyman, supra,* slip op. at 8-9, *amici* contend that in the present posture of this case the preliminary

injunctions must still be affirmed. HEW's views on the merits of the statutory claim are now clear. In a letter to appellant Wyman, dated November 10, 1969, the HEW Regional Commissioner reviewed New York's justifications for the challenged differential in payments and concluded that "given the materials submitted to date, we are unable to find that there is in effect a statewide standard being uniformly applied throughout the State" (A. 174). This Court thus has before it the Department's views as to how its standards apply to the New York statute and regulations and therefore should adjudicate this statutory claim.

CONCLUSION

The preliminary injunctions entered by the district court should be affirmed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 896

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Defendants-Appellants,

against

EDNA ROTHSTEIN, SYLVIA MILLER, HENRIETTA BATSON, CATHERINE JONES and DOLORES HARVANEK, as individuals and on behalf of all other persons similarly situated,

Plaintiffs-Appellees.

REPLY BRIEF AND APPENDIX FOR APPELLANTS

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REPLY BRIEF FOR APPELLANTS

Introduction

Since appellants' brief was filed in this Court the Legislature amended § 131-a of the New York Social Services Law. It was signed on March 31, 1970 and took effect on April 1, 1970. The purpose of the amendment was to increase the levels of grant to New York State welfare recipients including plaintiffs herein to account for increases

in the cost of living. A copy of that bill, which has become Chapter 120 of the Laws of 1970, is appended for the Court's convenience.*

Under the amendment the statutory differential between New York City recipients and those residing elsewhere in the State was continued since the Legislature specifically found that there were "higher costs of urban living in the utilization of programs, services and facilities * * *". The new schedules provide for increases in the basic grant of $7.00 for one individual, between $5.00 and $6.00 for two to seven individuals and $4.00 per person for larger families. The increases contained in subsection 3 for districts other than New York City are slightly less (p. 36, *infra*). However, the power of the Commissioner to raise those levels pursuant to subdivision 4 is continued.

The Commissioner has issued regulations raising the levels for districts outside New York City in much the same way as was done in the previous regulations which are the subject of this action.** A copy of these new regulations is also appended (p. 18, *infra*).

While the levels of grants under the new statute are considerably higher than those that were before the District Court, the basic legal issues presented by the District Court opinion are not altered.

* It is possible that before the Legislature adjourns this month that it will further amend the Social Services Law with regard to eligibility grants and allowances in order to comply with this Court's recent decision in *Rosado v. Wyman*, ——— U. S. ———, 38 L. Ed. 2d 269 (decided April 6, 1970). If that occurs, appellants will attempt to furnish copies of that statute to the Court and parties as soon as possible.

** The recipients from the former SAU counties (the cases here consolidated) are given the same grants as those residing in New York City pursuant to the injunction issued by the Court below.

A.

Even if the Statutory Claim Were Found to Have Merit, It Should Be Considered by the District Court in the First Instance.

The extraordinarily heavy justification required for the sweeping injunctions issued below is not supplied by any of the arguments offered in plaintiffs-appellees' brief. Indeed, plaintiffs finally acknowledge what the State has insisted all along—that the District Court strained to reach the constitutional question, contrary to the rule commanding avoidance of such questions where the case may be disposed of on other issues, and that it reversed the presumption of validity of the state statute.

Plaintiffs now concede "the district court erred in not determining the probabilities of appellees' success on the statutory claim" (Br. p. 42). This was no mere procedural misstep. *It was an integral part of the lower court's attempt*, at appellees' zealous prompting, to overturn the statute by any means at hand, regardless of violence done to the norms of judicial review. The plain fact is that this was substantial error which plaintiffs' sophistry fails to obscure, and which this Court's recent opinion in *Daudridge* v. *Williams* (—— U. S. ——, 38 USLW 4278 [decided April 6, 1970]) highlights:

> "We consider the statutory question first, because if the appellees' position on this question is correct, there is no occasion to reach the constitutional issues. *Ashwander* v. *T.V.A.* 297 U. S. 288, 346-347 (Brandeis, J., concurring); *Rosenberg* v. *Fleuti*, 374 U. S. 449."

This Court added (id., fn. 6) that "[w]hen attention has been focused on other issues, or when the court from which a case comes has expressed no views on a controlling question, it may be appropriate to remand the case rather than deal with the merits of that question in this Court." Since

the District Court here expressly avoided consideration of the statutory issue, which was not extensively briefed or argued below, remand here is clearly proper.

Plaintiffs' objections to the material adduced by the State are ironic.* It is they who have shifted ground and now seek to have this Court uphold the injunctions on a totally different ground from that employed by the lower court. Whether the statutory argument provides an adequate basis for the broad preliminary injunctive relief granted plaintiffs is an issue which the District Court, not this Court, should grapple with in the first instance.

B.

Plaintiffs Fail to Justify the Special Standard Carved Out by the Lower Court.

Dandridge v. *Williams* highlights the impropriety of the standard employed by the Court below to measure the validity of the statute. The District Court carved out an unjustified exception to the rule which bars the annulment of a statute unless the differentiation challenged is utterly

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* Plaintiffs' aspersions on the qualifications of Vernon Murphy, Esq. whose affidavit supported defendants' motion for summary judgment, are unwarranted. The time to prepare papers for the convening of the three-judge Court was very brief and further curtailed by the Court-ordered deposition of defendant Wyman. Plaintiffs' papers had of course been prepared before the institution of the order to show cause. Furthermore, the Board of Social Welfare was meeting during the week of July 14 and that meeting had been disrupted already by the absence of the Commissioner and the Deputy Commissioner at the deposition on July 15.

Finally, the only copy of the draft of the original affidavit prepared with the expert advice of many persons in the Department of Social Services for the Commissioner's signature was stolen from Mr. Murphy's briefcase on the night of July 15 and a new draft had to be prepared summarily on July 16. Logistically, only Mr. Murphy, who was designated by the Commissioner as the Department's representative in charge of this litigation, was available to sign it at that late date.

irrational. *McDonald* v. *Board of Election Commissioners*, 394 U. S. 802. It defied that rule, and concluded that because welfare legislation was involved "the equal protection standard to be applied should be stricter than that used upon review of commercial legislation" (112). Our main brief (pp. 34-36) refutes this conclusion. And *Dandridge* v. *Williams* disposes of it. Upholding a statute establishing maximum welfare allowances, this Court specifically held (38 USLW 4281):

> "[H]ere we deal with state regulation in the social and economic field, not affecting freedoms guaranteed by the Bill of Rights, and claimed to violate the Fourteenth Amendment only because the regulation results in some disparity in grants of welfare payments to the largest AFDC families. For this Court to approve the invalidation of state economic or social regulation as 'overreaching' would be far too reminiscent of an era when the Court thought the Fourteenth Amendment gave it power to strike down state laws 'because they may be unwise, improvident, or out of harmony with a particular school of thought.' *Williamson* v. *Lee Optical Co.*, 348 U. S. 483, 488. That era long ago passed into history. *Ferguson* v. *Skrupa*, 372 U. S. 726.
>
> In the area of economics and social welfare, a State does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect. If the classification has some 'reasonable basis,' it does not offend the Constitution simply because the classification 'is not made with mathematical nicety or because in practice it results in some inequality.' *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U. S. 61, 78. 'The problems of government are practical ones and may justify, if they do not require, rough accommodations—illogical it may be, and unscientific.' *Metropolis Theatre Co.* v. *City of Chicago*, 228 U. S.

61, 69-70. 'A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it.' *McGowan* v. *Maryland*, 366 U. S. 420, 426.

To be sure, the cases cited, and many others enunciating this fundamental standard under the Equal Protection Clause, have in the main involved state regulation of business or industry. The administration of public welfare assistance, by contrast, involves the most basic economic needs of impoverished human beings. We recognize the dramatically real factual difference between the cited cases and this one, but we can find no basis for applying a different constitutional standard. See *Snell* v. *Wyman*, 281 F. Supp. 853, aff'd, —— U. S. ——. It is a standard that has consistently been applied to state legislation restricting the availability of employment opportunities. *Goesaert* v. *Cleary*, 335 U. S. 464; *Kotch* v. *Board of River Port Pilot Comm'rs*, 330 U. S. 552. See also *Flemming* v. *Nestor*, 363 U. S. 603. And it is a standard that is true to the principle that the Fourteenth Amendment gives the federal courts no power to impose upon the States their views of wise economic or social policy."

That language should be dispositive here. As here, there was (*Id.* fn. 17) "no contention that the Maryland regulation is infected with a racially discriminatory purpose or effect such as to make it inherently suspect." And, significantly, Maryland also has a slight geographical differential in welfare allowances (not challenged in *Dandridge* v. *Williams*).

See page 4278:

"The regulation here in issue imposes upon the grant that any single family may receive an upper limit of $250 per month in certain counties including Baltimore City, and of $240 per month elsewhere in the State."

The plain fact is that the family maximum grant sustained in that case worked far more of an actual inequity than the narrow geographical distinction here at issue. The plaintiffs there received the maximum for "Baltimore City, where the $250 month maximum grant applies". (opinion of DOUGLAS, J., dissenting, 38 USLW 4283, fn. 1) —instead of $296.15 and $331.50 per month respectively (*Id.* p. 4283). That disparity far exceeds the slight differential for New York City residents under § 131-a, totalling $208 instead of $191 for a family of four, or $70 instead of $65 for an individual recipient, exclusive of shelter costs.

The reasons for the small differential for New York City recipients are discussed in our main brief and need no amplification here. That the State's finding of higher actual needs for city dwellers on welfare is not the only possible result we do not doubt. Indeed, as plaintiffs correctly state (Br. p. 25), defendant Wyman has recently advocated a uniform statewide standard of need and of allowances as part of a continuing policy discussion. But so long as the legislative determination was in the area where reasonable minds might differ, the statute may not fairly be deemed arbitrary and consigned to oblivion. Just as this Court held in *Dandridge* v. *Williams* (*id.* 4282):

> "We do not decide today that the Maryland regulation is wise, that it best fulfills the relevant social and economic objectives that Maryland might ideally espouse, or that a more just and humane system could not be devised. Conflicting claims of morality and intelligence are raised by opponents and proponents of almost every measure, certainly including the one before us. But the intractable economic, social, and even philosophical problems presented by public welfare assistance programs are not the business of this Court. The Constitution may impose certain procedural safeguards upon systems of welfare administration, *Goldberg*

berg v. *Kelly*, *ante*. But the Constitution does not empower this Court to second-guess state officials charged with the difficult responsibility of allocating limited public welfare funds among the myriad of potential recipients."

This Court itself recognized that although New York City was included with certain surrounding counties in New York's public assistance scheme prior to July 1, 1969, the actual payment to New York City recipients was considerably higher than that generally throughout the rest of the State. Indeed, this Court pointed out in *Rosado* v. *Wyman*, *supra*, at 38 USLW 4271:

> "The impact of the new system has been to reduce substantially benefits paid to families of these petitioners and of those similarly situated, and to increase benefits to New York City recipients by almost $40,000,000. 304 F. Supp. at 1369-1370. The effect of the new program on upstate cases is less severe, with gains to some families apparently cancelling out losses to others, but the net effect is a drastic reduction in overall payments since New York City recipients comprise approximately 72% of the State's welfare clientele. 304 F. Supp. at 1369."

The very existence of the cyclical grant to cover recurring special grants in clothing and household furnishings to which every New York City recipient was entitled was a substantial difference. The statutory difference which plaintiffs object to is $25.00 a month for a family of four and $10.00 a month for an individual. This difference reflects approximately the difference between the cyclical grants and the relatively infrequent special grants for which non-New York City recipients were qualified. Thus for a family of four the difference was $25.00 a month. The amount of the cyclical would be $33.33 a month. This Court specifically recognized that certain special

grants were considered regularly recurring expenses to City welfare recipients (*id*, at 38 USLW 4272);

> "* * * particular items, such as laundry, telephones, had formerly been deemed essential by New York, and were considered regular recurring expenses to a significant number of New York City Welfare residents. We need look no farther than the state social service department's own regulations and the action taken by the state administrators in providing the $25/quarter cyclical grant to city residents in the 1968 pilot project."

The cut in welfare expenditures found by this Court in *Rosado* v. *Wyman* was based on change of status of New York City recipients. However, it must be remembered that the Legislature made an effort to continue the higher grants which had previously been accorded New York City recipients and this effort is the subject of the instant proceeding.

Particularly in the context of welfare, with enormous fluctuations in allowances from state to state (see our main brief at pp. 38-39), and with the imprimatur of this Court on family maximums, which create substantial differences in allowances to persons with admittedly similar needs, it would parody justice to insist that New York abolish its slight differential benefiting metropolitan welfare recipients. In determining precisely how to "allocat[e] limited public welfare funds among the myriad of potential recipients," legislative decisions must be reached and those decisions will of necessity benefit some. New York has imposed no family maximum. The very statute complained of by plaintiffs authorizes the Commissioner to abolish the differential upon proof that the standard of need and cost of meeting that standard in any county equals that in New York City (§ 131-a[4]). If New York's legislative discretion did not fairly extend to this, then it has no discretion at all.

C.

The Presumption of Validity of the State's Grounds for the Differential Has Not Been Overcome.

The attempts of plaintiffs to impugn the bases for the legislative differential do not withstand scrutiny. There is no evidence whatever to warrant the claim (Pltfs' Br. p. 58) that there is any difference in private income between welfare recipients in New York City and those outside the city. There is no procrustean requirement that a standard of need be identical throughout the State. Such a rule would amount to a straining at gnats, since such standards vary so sharply from one state to another. What is required is that such standards within a given state not be based on caprice. The burden of showing this caprice was on plaintiffs and it has not been satisfied on this record.

Plaintiffs mistake our discussion of the impact of the far higher crime rate on welfare recipients. We made no claim that stolen welfare checks could not be replaced upon application by the recipient, but the number of such thefts demonstrates the specific victimization of the New York City welfare recipient in the broader picture of the high crime rate in the city. Moreover, other stolen property for which specific figures were not available—household appliances, clothing, watches and the like—are not covered by any grant for replacement. And the added costs of locks, window gates, taxicabs when returning home at late hours, and other direct results of the higher urban incidence of crime are present even though plaintiffs choose to ignore them.

Similarly, plaintiffs mistake our reference to rent control within New York City. The cost of shelter is a major component of the standard of need. See "Simplified Methods For Determining Needs," U. S. Dept. of Health, Education and Welfare (1961), copies of which are appended to the *amicus* brief of the United States. See also

18 NYCRR § 352.4(b). Thus, lower rents within New York City directly result in a lower standard of need, and higher rents outside the City in a higher standard of need, compensating for the slightly higher allowance within the City for components of the standard of need other than rents. See our main brief at pages 25-27. The fact that rent control exists in a few suburban areas (Pltfs'. Br. p. 61) is irrelevant here where the figures set forth in our brief at pages 25-26 and the relatively high rent paid by plaintiffs demonstrate beyond cavil that average rents for welfare recipients are far higher outside the City.

Reliance by plaintiffs on the events of 20 years ago (Br. p. 63) sheds little light on the issue at bar. The suggestion therein that the State "exhibited a pattern of non-conformity" is far-fetched since admittedly, between 1951 and 1969, recipients in New York and the suburban counties received precisely the same allowance.

Plaintiffs' repeated denigration of the State's reasons for the disparity runs completely counter to this Court's admonitions in *Dandridge* v. *Williams* (p. 4282) that "the Constitution does not empower this Court to second-guess state officials charged with the difficult responsibility of allocation of limited public welfare funds among the myriad of potential recipients"; and in *Rosado* v. *Wyman*, that "Speculation as to legislative and executive motive, is to be shunned." The statute explicitly provides for an increase in allowance levels to that provided New York City recipients upon a showing to the Commissioner that such an increase is warranted. It is to the Department of Social Services, with its experience in administering the program, its staff of civil servants and expertise in the field, that such an application should be addressed, at least in the first instance. As we have shown, any county Social Services Department is free to make such an application, and any recipient is free to request that such an application be made. Judicial review of a denial of such an

application is available in the New York courts under Article 78 of the Civil Practice Law and Rules. In this posture, the sweeping injunctions granted by the Court below were improvident and should be set aside.

Plaintiffs' present reliance on the non-conformity of § 131-a to the Social Security Act is a question this Court need not reach. See page 3, *supra*. But if the merits were reached, that claim is insubstantial.

The Social Security Act requires only that a state plan operate throughout an entire state and be administered by one state agency. 42 U.S.C. §§ 602(a)(1), (3); 1382(a)(1), (3). New York's plan meets these criteria. As the United States' *amicus* brief concedes (Br. pp. 7-8), the Social Security Act does not even explicitly require a state to enunciate a standard of need, much less one at precisely the same level throughout the State. Of course New York has had an expressed standard of need for decades—enunciated administratively (18 NYCRR § 352.4). This standard is statewide in every sense, and fully comports with every requirement of Congress. It is the level of benefits, as distinct from the standard of need, which differs slightly. (See the discussion in *Rosado* v. *Wyman*, U. S. ——, 38 USLW 4266, 4269, 4271-2 [decided April 6, 1970]). And nothing in the Social Security Act forbids that.

It is the regulations of HEW, not any act of Congress, which speak of an "objective and equitable" state plan (45 CFR 233.20[a][1]) and a "statewide" standard to be "uniformly applied throughout the state" (45 CFR 233.20[a][2][i], [iii]). There is nothing in the statute (§ 131-a) violative of these regulations. The requirement that a state plan be "objective and equitable" is no broader than the due process and equal protection clauses. Thus it does not advance plaintiffs' position here. And the regulation referring to uniform statewide application cannot, in the absence of specific language, be held to forbid

geographic or other distinctions in a state plan. Indeed, New York's § 131 for many years has required the state standard of need to take into account "variations in cost from time to time and between localities." HEW has repeatedly approved New York social services plans formulated pursuant to that standard, which explicitly permits geographical variation. And levels of assistance in New York have for decades contained slight geographical differentials (see main Br. p. 8, fn. 3).

Thus, whether the Constitution, the Social Security Act or the HEW regulations be considered, the touchstone is in any case whether the differentials are arbitrary. If they meet the test of rationality under the equal protection clause, they cannot reasonably be held violative of anything in the Act or regulations.

Apart from this, this Court held in *Rosado, supra*, that non-conformity with a federal statute, as opposed to unconstitutionality, would not be a basis for a declaration of the invalidity of the state statutes. At most it would constitute a ground for declaratory relief and an appropriate injunction by the District Court against the payment of federal matching funds, according to the new schedules, should the State not develop a conforming plan within a reasonable period of time." 38 L ed 2d W 1023. Appellants in original Perhaps for this reason plaintiffs stressed their equal protection claim below, and the Court improvidently ignored the statutory issue and prematurely decided the Constitutional one. Under the statutory question, the only one the District Court should have examined (*Rhoades v. Williams, supra*), the injunction issued by it could not have been issued.

Perhaps also this was because, as we have seen, it was evident that the Social Security Act was not violated by anything in § 131 a. The requirement of a "statewide" standard "uniformly applied throughout the state" is contained in the regulations, not the statute. And whatever

the effect of non-conformity with the Social Security Act itself (*Rosado* v. *Wyman*, *supra*; *King* v. *Smith*, 392 U. S. 309), if the asserted non-conformity is only between the state statute and a regulation of HEW, this non-conformity, even if established, would not warrant the extraordinary drastic preliminary relief granted by the Court below. Nothing in *Rosado* justifies plaintiffs' suggestion that non-conformity with the regulation would suffice to support the injunction here imposed on the State. *Rosado* involved [illegible] *Smith*. In *Rosado*, this

[illegible]

II

The Unjustified Attack on the State Legislature's Motives Indulged in the Lower Court was an Impermissible Basis for Its Invalidation of a State Statute Promoted by Democrats

[illegible]

"speculation as to legislative and executive motive is to be shunned." Yet this is just what the Court below did, and what plaintiffs (and the Center on Social Welfare Policy and County of Nassau as *amici*) continue to do.

The issues in this case are whether the District Court should have stayed its hand in view of the state remedy available to the plaintiffs under the forum of the state statute (*Hart v. Bingaman*, [illegible] 38 USLW 4170), and whether (assuming ripeness) HEW's an appeal was incompatible with the Social Security Act; an issue which the District Court never decided. In the present posture of this case, reversal and remand, in order for the District Court to rule on the statutory issue of the grant of defendants' motion for summary judgment, is the only proper course.

CONCLUSION

The order of the District Court should be reversed and the case remanded with directions that defendants' motion for summary judgment be granted.

Dated: New York, New York, April 16, 1979.

Respectfully submitted,

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Appendix

Chapter 120 Laws of 1970 (New York)

An Act

To amend the social services law, in relation to a schedule of allowances and grants for public assistance

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Legislative findings and purpose. In nineteen hundred sixty-nine the legislature established schedules of maximum monthly grants and allowances of public assistance for social services districts in New York state, based upon the costs of meeting the needs of public assistance recipients in the various social services districts. These schedules, effective July first, nineteen hundred sixty-nine, reflected the cost of needs based on the latest cost studies of the department of social services completed prior to passage of the legislation. New studies of cost needs made by the department projected to May first, nineteen hundred seventy indicate a cost of living increase since the last study of approximately ten per cent.

The legislature therefore finds and declares that it is necessary and in the best interests of the people of the state to provide new schedules for maximum monthly grants and allowances reflecting the cost of living increase, and further that there exist differences in the cost of meeting such needs of public assistance recipients in various areas of the state which reflect the higher costs of urban living and the utilization of programs, services and facilities, and that these differences are recognized and shall continue to be recognized in the levels of monthly grants and allow-

[ ] Explanation. Matter in italics is new; matter in brackets [ ] is old law to be omitted.

anges established for the various social services districts throughout the state.

§ 2. Subdivision two of section one hundred thirty-one-a of the social services law, as added by chapter one hundred eighty-four of the laws of nineteen hundred sixty-nine, is hereby amended to read as follows:

2. The following schedule of maximum monthly grants and allowances shall be applicable to the social services district of the city of New York:

Number of Persons in Household						
One	Two	Three	Four	Five	Six	Seven
[$50	$116	$162	$208	$254	$297	$340]
$77	*$128*	*$179*	*$230*	*$281*	*$328*	*$375*

For each additional eligible needy person in the household there shall be an additional allowance of [forty-three] *forty-seven* dollars monthly.

§ 3. Subdivision three of section one hundred thirty-one-a of such law, as added by chapter one hundred eighty-four of the laws of nineteen hundred sixty-nine, is hereby amended to read as follows:

3. The following schedule of maximum monthly grants and allowances shall be applicable to all other social services districts:

Number of Persons in Household						
One	Two	Three	Four	Five	Six	Seven
[$68	$101	$142	$183	$224	$257	$290]
$66	*$111*	*$156*	*$201*	*$246*	*$282*	*$318*

For each additional eligible needy person in the household there shall be an additional allowance of [thirty-three] *thirty-six* dollars monthly.

§ 4. This act shall take effect April first, nineteen hundred seventy.

Bulletin 134, "Standards of Assistance," March 31, 1970

New York St. Department of Social Services

These page replacements for Bulletin 134 reflect the major changes in standards of assistance enacted into law effective April 1, 1970.

1. Increases in basic monthly allowance for individuals and families in Schedules SA-1, SA-2 and SA-3 (p. 41, 43, 44).
2. An increase in the additional allowance for AABD applicants, recipients and essential persons (p. 7).
3. Disregard of $7.50 per month of *any* income for AABD applicants and recipients (p. 21).

In accordance with the recognition in law of a cost-of living increase of approximately 10%, Department Regulations also provide for an increase in personal allowances for persons living in boarding or nursing homes (p. 14) and for the cost of meals not prepared at home (Schedules SA-6 (p. 46) and SA-8 (p. 23)).

A one-time clothing allowance of $55 has also been provided for recipients in an approved training program, including the Work Incentive Program (p. 11).

George K. Wyman
Commissioner

III.

C. *Needs*

Department Regulation Section 352.1

(a) *Of persons who constitute or are members of a family household*

(1) For all items of need, exclusive of shelter, fuel for heating, additional cost of meals for persons who are unable to prepare meals at home, additional grants for replacement of clothing and furniture and allowance for occupational training, additional grants for recipients of AABD as provided under paragraph (4)

each social services district shall utilize the schedule of monthly grants and allowances applicable to it established in paragraph (2) of this subdivision.

(2) The monthly grants and allowances shall be as follows:

[See schedules SA-1, SA-2 and SA-3.]

(3) For the purpose of such monthly grants and allowances a child or children or adults residing with self-maintaining non-legally responsible relative or friends, shall be considered as a household separate from the self-maintaining relatives or friends.

(4) *Additional allowance for AABD recipients*

(a) Each AABD recipient shall be allowed an additional allowance in the regularly recurring estimate of need in the amount of $10.00 per month for recipients living alone and $6.25 per month for recipients living with a family.

(b) For purposes of this requirement:

(i) A person shall be considered "living with a family" if residing with other members of his family who are in receipt of public assistance.

(ii) The allowance shall be provided to persons not residing in institutional facilities, such as a home for adults or home for the aged, or residing in boarding homes or in family care arrangements. [Note: Persons in such facilities are eligible to receive a personal expense allowance of $17.00 per month. [See Department Regulation Section 352.1(b)(2)(i)]

(iii) Such allowance shall be provided for an essential person in AA/SD.

[Grants for Essential Persons in AA/SD, Department Regulation Section 385.3(c)]

A grant shall include provision for the needs of a person, whether a relative or non-relative of the recipient, whose continuous presence in the home of the recipient is essential to the well-being of the recipient, provided:

(1) The person is residing in the recipient's home;

(2) The person is eligible for public assistance other than AA/SD and AIM on the basis of his income and resources;

(3) The person agrees to render necessary services and care to the recipient; and

(4) The recipient approves the plan.]

(d) (c) Each social services district shall make an allowance for fuel for heating when it is not

included in the cost of shelter in accordance with the following schedule:

[See schedule SA-4.]

(66) For children or adults residing with self-maintaining non-legally responsible relatives or friends, an allowance for fuel for heating shall be pro-rated.

(66) An additional allowance for fuel shall be granted when made necessary by exceptionally severe weather, overly exposed location or unusually poor construction of a dwelling, or by reason of poor health. Circumstances requiring such additional allowance shall be fully recorded.

(67) *Shelter*

(a) Each social services district shall establish an allowance schedule for rent based on the number of rooms, with or without heat, utilities, furniture and furnishings. Such allowance schedule shall provide a sufficient amount for all persons to obtain housing in accordance with standards of public health in the community. Such schedule shall make provision for the payment of rent in state aided public housing and in middle income housing. The schedule established shall be filed with the department. An allowance for rent shall be made in the amount actually paid by the recipient but not in excess of the appropriate maximum of such schedule. When the local recipient is obligated to pay for water or a separate charge, an additional allowance shall be made for the additional amount required to be paid.

Appendix

(iii) For children or adults residing with a self-maintaining non-legally responsible relative or friend, the allowance for rent shall be negated.

(iii) An allowance for rent shall be made for a period not in excess of 60 days, when essential to retain a housing accommodation to which a recipient temporarily receiving care in a medical facility may return upon discharge from such facility.

(iv) An allowance for rent shall be made for recipients who are tenants of city, state or federally aided public housing in accordance with the following schedule:

Apartment Size	*Monthly Rent*
"0" Bedrooms	$ 69
1 Bedroom	81
2 Bedrooms	90
3 Bedrooms	101
4 Bedrooms	107
5 Bedrooms	110

Note: Required fees or charges shall be provided for such items as security deposit, extermination, deposit against breakage and loss, and keys. See Section D Purchase of Services.]

(v) *Shelter costs for client-owned property*

(a) *Carrying charges*

On client-owned property used as a home, carrying charges shall be met in the amount actually paid by the recipient but not in excess of the appropriate maximum

of the rent schedule for the items of taxes, interest on mortgage, fire insurance, water rates and assessments.

[See Department Regulation Section 352.8(b)(3).]

III.C.(a)(6)

(vi) If the furniture or household equipment of an applicant who has not been a recipient of public assistance within the previous six months is essential to making his living accommodations habitable but are presently encumbered by a chattel mortgage or were purchased under a conditional sales contract, every effort shall be made to defer, cancel or reduce payments on such chattel mortgage or conditional sales contract. If all such efforts fail, an allowance may be made for a compromise settlement of such payments or, if a compromise cannot be reached, for other essential payments.

[Note: The above provision is limited to persons who have not been recipients of public assistance during the six months preceding the present application.]

(8) *Additional cost of meals*

Provision for the additional cost of meals for persons unable to prepare meals at home shall be allowed in accordance with the following schedule: [See schedule SA-5.]

(9) *Grants for clothing and furniture in case of catastrophe*

Each social services district shall make grants for partial or total replacement of clothing or furniture

which has been lost in a fire, flood or other like catastrophe. These grants, for one or more items of clothing or furniture shall be based upon the current local price of such item, but shall not exceed the maximum allowances in the following schedule. [See schedule SA-6.]

(10) *Occupational training allowances.*

(a) Recipients in an approved occupational training program, including the Work Incentive Program, shall receive upon enrollment, [illegible] a one-time allowance of $55.00 to meet additional clothing needs incident to such training.

New

(b) Allowances shall be made for the costs of tuition, books, supplies and other essentials required to enable an unemployed parent or minor between 16 and 21 years of age receiving ADC and any person receiving HR to obtain suitable occupational training from a high school or other institution licensed or approved by the State Education Department, provided such person could not otherwise obtain such training without cost and demonstrates to the satisfaction of the social services official that he or she possesses the talent, aptitude and ability necessary to benefit from the proposed course of training.

(10) *Payment for services and supplies already received.*

Assistance grants shall be made to meet only current needs. Under the following specified circumstances payment for services or supplies already received is deemed a current need.

Appendix

(iii) If a check for a grant is reported lost or stolen, an affidavit of loss shall be required at the time of issuance and payment of the check shall be stopped. Such check shall be replaced. If payment cannot be stopped, the agency shall claim state reimbursement on only one of the two checks.

(iv) An allowance to meet the cost of rent, shall be made for the entire month in which the case is accepted if essential to return the living accommodation. A grant to meet the cost of such items as taxes and interest on mortgages may be made for the billing period immediately preceding acceptance, if such payment is essential to the health and safety of the recipient.

(v) A grant to pay for utilities already furnished to prevent a shut off up to but not exceeding a four month period immediately preceding the date of application for utilities for an applicant on the same dwelling for which he is applying for utilities.

[Note: Section 42 of the Transportation Corporations Law provides that gas or gas and electric corporations must provide service to recipients of assistance even though the recipient owes arrearages to the corporation for service provided in a prior dwelling place.]

(vi) A grant may be made to pay for rent, taxes or mortgage for a period prior to the month in which the case was opened or prior to the period in which a current bill was due when

the case was opened under the following specified conditions:

(*a*) such payment is essential to forestall eviction and no other facilities are available; and

(*b*) the health and safety of the applicant or recipient is severely threatened by failure to make such payment; and

(*c*) the authorization for payment of such a back bill receives special written approval by the social services official or such other administrative officer as he may designate, provided such person is higher in authority than the supervisor who regularly approves authorization.

[Note: Department Regulation Section 351.27 provides:

Correction of error

(a) A social services official may make a grant to correct an error which denied an application for assistance, discontinued a recipient from assistance or otherwise deprived a recipient of the full amount to which he was entitled, for a period not in excess of two months preceding the month in which the correction is made.

(b) A social services official may make a grant to correct an error after a request for a fair hearing but prior to the hearing itself or the hearing decision, retroactive to the date the incorrect action was taken.

Appendix.

Department Regulation Section 358.8 provides:

Correction of an error pursuant to a fair hearing decision

When a fair hearing decision has ordered the correction of a discontinuance, the correction of a denial of an application for assistance, or the correction of the amount of assistance, a grant shall be made to cover the full amount to which the applicant or recipient was entitled in accordance with the decision for the entire period from the date the incorrect action was taken.]

(b) ***Of persons whose living arrangements are board and room or care in a congregate facility***

Department Regulation Section 352.4 (continued)

(1) For persons unable to be cared for in their own homes, board and room, care in a home for adults, convalescent home, home for the aged, private proprietary or voluntary residential facility for the mentally retarded or other suitable facility shall be provided by the social services district. Each social services district shall establish rates for board, for board and room, and for care in a home for adults, a convalescent home, a home for the aged, and private proprietary or voluntary residential facility for the mentally retarded, other than a hostel for the mentally retarded, as follows:

(i) For board and room

An amount to cover the cost of board, the laundering of linens, additional utilities and household supplies, plus room rent and a reasonable profit except where furnished to a relative.

(ii) For care in a proprietary home for adults, convalescent home and private proprietary residential facility for the mentally retarded: The lowest rate for which suitable care can be purchased from such facilities.

(iii) For care in a non-profit home for adults, convalescent home, home for the aged, or a voluntary residential facility for the mentally retarded: The per diem cost of such care with due consideration to the services provided and the tax exempt status of the home.

(2) (i) Adult recipients living in a boarding home, home for adults, home for the aged, intermediate care facility, hostel for the mentally retarded, residential facility for the mentally retarded, and recipients receiving care in infirmaries, nursing homes or similar medical facility shall be granted an allowance of $17 per month for personal expenses, including clothing and incidentals.

(ii) For patients incapable of handling cash, clothing and incidentals not provided by the facilities shall be provided in kind.

(3) An allowance of the rate for shelter in a congregate facility shall be made for a period not in excess of 30 days when essential to retain place to which a recipient temporarily receiving care in a medical facility may return upon discharge from such facility.

(4) An allowance to meet the cost of board and room or care in a home for adults, convalescent home, home for the aged, intermediate care facility, hostel for

the mentally retarded or residential facility for the mentally retarded shall be made for the entire month in which the case is accepted if essential to retain the use of the facility. An allowance may be made to pay for the cost of such care for a period prior to the month in which the case was opened, but not prior to the date of application under the following specified conditions:

(i) such payment is essential to retain the care in the facility and no other facilities are available; and

(ii) the authorization for payment of such back bill receives written approval by the social services official or such other administrative officer as he may designate, provided such person is higher in authority than the supervisor who regularly approves authorization.

(c) *Allowance for care in a hostel*

The allowance to be provided for the cost of care in a hostel for the mentally retarded under voluntary auspices shall be based on a rate established by the Department.

(d) *Duplication of allowances and grants*

(1) Supplemental allowances and grants may not be made in excess of established schedules.

(2) A special allowance and grant may be made to duplicate a grant already made because the cash has been lost or stolen. Such duplicate allowance and grant is not reimbursable by the State.

Appendix:

F. *Exemption of income and resources*

1. *General policy on determination of availability of income and resources Department Regulation Section 352.7*

(a) All income and resources of an applicant for or recipient of AABD, ADC or HR shall be considered in order to determine its availability; such income and resources shall be reasonably evaluated; and, when determined to be available, after policies governing the exemption and disregard of such income and resources have been applied, shall be applied towards meeting the needs of an individual and his dependents. No inquiry shall be made of the amount of earnings of a child under 14 years of age.

(b) When the terms of an award, legislative intent of a government benefit, the rules of an organization paying a benefit, the nature of a trust fund, or the agreed-upon intent of a friend, non-legally responsible relative, social agency or other organization limits the use of cash income, the social services official shall abide by such restriction, when verified. The restriction may limit the use of the income to a specified purpose or to a particular member or members of the household. However, whenever any contribution from a non-legally responsible relative or friend is sought to be restricted for the purpose of supplementing a State prescribed or approved standard it shall not qualify as a permissible restriction of income, unless the social services official determines that the health and welfare of the recipient would be specifically and materially enhanced thereby.

New [(c) Any income of an applicant for or a recipient of AABD shall be disregarded in the amount of $7.50 per month.

2. *Earned income*

Department Regulation Section 352.8

(1) "Earned income" shall mean income in cash or in kind earned by an individual through the receipt of wages, salary, commissions, or profit from activities in which he is engaged as a self-employed individual or as an employee. Such earned income may be derived from his own employment such as a business enterprise or farming; or derived from wages or salary received as an employee. It includes earnings over a period of time for which settlement is made at one given time, as in the instance of sales of farm crops, livestock, or poultry. In instances of lump sum payment for services rendered over a period of more than one month, such income shall be prorated on a monthly basis with appropriate monthly exclusions. In considering income from farm operation, the option available for reporting under OASDI, namely the "cash receipts and disbursements" method, i.e., a record of actual gross, of expenses and of net is an individual determination and is acceptable. [See budgeting illustration in Section 4, exemption of earned income of a blind person.

III.F.2.(a)

(2) With reference to commissions, wages or salary, the term "earned income" means the total amount of earnings before deduction of any personal and non-personal expenses incident to employment.

(3) With respect to self-employment, the term "earned income" means the total profit from a business enterprise, farming, etc., resulting from the gross income received less the business expenses i.e., total cost of the production of the income. Personal expenses, such as income-tax payments, lunches and

transportation to and from work, are not classified as business expenses.

(b) *Computation of net earned income*

(1) In computing the amount of net earned income to be applied against the estimate of needs, the following method shall be utilized:

(i) The applicable amount of exempt earned income shall be deducted from the gross amount of earned income.

(ii) All expenses incident to employment, personal and non-personal, shall then be deducted.

(iii) Prescribed special work expenses next be deducted.

(iv) The net amount remaining shall be applied against the estimate of needs in determining the amount of assistance payment.

(2) In computing net earned income of a business, all operating expenses shall be deducted from the gross income, but in no instance shall there be an allowance for expenses in excess of income.

(3) In computing net income from client-owned property all operating expenses shall be deducted from gross property income and shall include usual carrying charges, principal payments and repairs. Where the income does not fully meet gross property cost but where the property is used as the home and where the net property cost is less than the agency rent schedule allows for such a recipient, the net cost may be included in the budget estimate of need as a shelter item.

(4) When wages are garnisheed, property income assigned, bank accounts attached, or other cash income is unavailable to the applicant or recipient, such income cannot be applied against need until and unless the agency can secure a release from such restriction.

III.F.2.(b)(4)

[NOTE: Social Services Law Section 137-a provides that earnings paid or payable to a recipient or a person otherwise in need of public assistance or care shall be exempt from assignment, income execution and installment payment. Written notification shall be sent by the social services official to the employer when the employee is a recipient or that he would become in need if the assignment, income execution and installment payment were enforced; and when public assistance to the employee or need therefore is terminated.]

3. *Expenses incident to employment Department Regulation Section 352.9*

(a) The following expenses incident to employment shall be deducted from gross earnings:

(1) All non-personal work expenses such as union dues, cost of tools, materials, uniforms and other special clothing required for the job, mandatory fees for licenses or permits fixed by law.

(2) All personal work expenses such as federal, state and local taxes, social security taxes, group insurance, lunches and transportation. The allowable deduction for meals incident to employment shall be in accord with the following schedule:

Rev. [

Lunch	$1.00
Dinner	1.45

[The expenses for day care shall be provided by means of a deduction from earnings when such expenses are less than the amount of income available for application against the estimate of needs; otherwise such day care expenses shall be provided for as a purchase of service. See Department Regulation Section 352.5.]

III.F.

4. *Exemption of earned income*
Department Regulation Section 352.10

(a) *Earned income of a blind person*

(1) The first $85 per month and one-half of gross earned income in excess of $85 per month shall be exempt and disregarded in determining the eligibility of such person for AABD and the eligibility for assistance of a dependent member of his family.

(2) Additional amounts of other income and resources as may be necessary to achieve a plan of self-support shall be allocated for one year, provided the plan has been approved by the Commission for the Blind and Visually Handicapped and the plan has been accepted and presented by the blind person as his own plan for which he wishes to use his own resources.

[Budgeting illustration: When a blind recipient earns income on a continuing basis but receives it only periodically, the income for the year should be totalled. The $85 monthly exemption should be totalled also for a year, or $1020. If the lump sum

or sums received during the year do not exceed $1020 the recipient may retain them and they are not budgeted as income. If the lump sums exceed $1020 for a year, one-half the excess is also deemed exempt income and the other half applicable as income against current and future needs. For example, a blind farmer receives net income per month ranging from $60 to $150 with an annual total of $1320. His budgeted needs during the year average $120 per month and the agency has granted the full $120 per month, exempting all income until the end of the year. The agency then subtracts $1020 (12 times $85) leaving a balance of $300. One-half of this is $150. The recipient properly retains, as exempt income, a total of $1020 plus $150, or $1170. The agency deducts the remaining $150 as income or takes a recovery of $150. The latter alternative keeps the case continually active as AABD.]

(b) *Earned income of ADC recipients and applicants.*

(1) All of the earned income of a child or minor receiving ADC, who is a full-time or part-time student not employed full-time, shall be exempt and disregarded as income or resources in determining eligibility or degree of need. For purposes of this paragraph:

(i) "School attendance" means attending a school, college or university or a course of vocational or technical training designed to fit a person for gainful employment or participation in the Job Corps under the Economic Opportunity Act.

(ii) "Part-time school attendance" means a school schedule equal to at least one-half of a full-time curriculum as determined by the educational authority.

Appendix.

Schedule SA-1

Monthly Grants and Allowances

NEW YORK CITY

COUNTIES OF: Dutchess, Greene, Monroe, Nassau, Suffolk, Ulster and Westchester and City of Poughkeepsie.

Number of Persons

One	*Two*	*Three*	*Four*	*Five*	*Six*	*Seven*	*Each Additional Person*
$ 77	128	179	230	281	328	375	47

Schedule SA-2

Monthly Grants and Allowances

COUNTIES OF: Albany, Broome, Cayuga, Chemung, Chenango, Clinton, Columbia, Cortland, Delaware, Essex, Franklin, Fulton, Hamilton, Herkimer, Jefferson, Lewis, Livingston, Madison, Montgomery, Oneida, Onondaga, Ontario, Orange, Orleans, Oswego, Otsego, Putnam, Rensselaer, Rockland, St. Lawrence, Saratoga, Schenectady, Schoharie, Schuyler, Seneca, Sullivan, Tioga, Tompkins, Warren, Washington, Wayne and Yates.

Number of Persons

One	*Two*	*Three*	*Four*	*Five*	*Six*	*Seven*	*Each Additional Person*
$ 69	115	161	207	253	294	335	41

Schedule SA-3

Monthly Grants and Allowances

COUNTIES OF: Allegany, Cattaraugus, Chautauqua, Erie, Genesee, Niagara, Steuben and Wyoming.

Number of Persons

One	*Two*	*Three*	*Four*	*Five*	*Six*	*Seven*	*Each Additional Person*
$ 65	111	157	203	249	290	331	$ 41

Appendix.

Schedule SA-5

Monthly Allowances for Fuel for Heating

	1 & 2 Persons	3 & 4 Persons	5 & 6 Persons	7 & 8 Persons	9 & 10 Persons
New York City & Counties Of: Dutchess, Monroe, Nassau, Suffolk, Ulster, Westchester.					
Year Round Basis	$ 14.80	15.00	16.60	18.20	19.70
Eight Months Heating Season	20.50	21.00	23.35	25.75	28.40
Counties Of: Allegany, Chautauqua, Erie, Genesee, Niagara, Steuben.					
Year Round Basis	12.60	14.00	15.40	18.20	21.00
Eight Months Heating Season	19.00	21.10	23.10	27.40	31.60
City of Jamestown:					
Year Round Basis	9.20	9.70	11.00	12.20	13.30
Eight Months Heating Season	12.40	13.30	15.00	16.80	18.60
Counties Of: Albany, Broome, Cayuga, Chemung, Chenango, Columbia, Cortland, Greene, Livingston, Onondaga, Ontario, Orange, Orleans, Putnam, Rensselaer, Rockland, Schoharie, Tioga, Wayne and Yates.					
Year Round Basis	15.50	17.10	20.20	23.40	26.60
Eight Months Heating Season	22.60	25.00	29.70	34.40	39.20
Counties Of: Cattaraugus, Delaware, Fulton, Madison, Montgomery, Oneida, Otsego, Saratoga, Schenectady, Schuyler, Seneca, Sullivan, Tompkins, Warren, Washington and Wyoming.					
Year Round Basis	17.00	18.80	22.30	25.80	29.20
Eight Months Heating Season	24.80	27.40	32.60	37.80	48.00
Counties Of: Clinton, Essex, Franklin, Hamilton, Herkimer, Jefferson, Lewis, Oswego and St. Lawrence.					
Year Round Basis	18.60	20.50	24.30	28.10	31.80
Eight Months Heating Season	27.10	30.00	35.60	41.30	47.00

Schedule SA-6

Restaurant Allowance Schedule

Monthly allowances to be added to appropriate monthly grants and allowances for combinations of restaurant meals and meals prepared at home, including sales tax.

Lunch and dinner in a restaurant	$47.00
All meals in a restaurant	$64.00

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 896.—October Term, 1969.

George K. Wyman, etc., et al., Appellants, v. Edna Rothstein et al. | On Appeal From the United States District Court for the Southern District of New York.

[June 1, 1970]

Per Curiam.

Appellees commenced this action in the federal District Court for the Southern District of New York challenging on equal protection and statutory grounds § 131-a of the New York Welfare Law which provides for payments to welfare recipients in Nassau, Suffolk, and other New York State counties in lesser amounts than provided for residents of New York City should the Welfare Administrator determine that adequate cause exists for the differential. A three-judge court was convened and it found that appellees' likelihood of success on their constitutional claim warranted the issuance of a preliminary injunction against what it found to be the payment of welfare in violation of the Equal Protection Clause of the Fourteenth Amendment. The Court found it unnecessary to consider appellees' statutory claims. We noted probable jurisdiction. — U. S. — (1970).

Subsequent to the decision of the District Court this Court rendered its decision in *Rosado* v. *Wyman*, — U. S. — (1970), wherein we held that a federal court called upon to pass upon the constitutional validity of a State's welfare program should, before reaching the constitutional issues, consider first any pendent statutory claims that are presented, notwithstanding the pendency

of negotiations between the State and the Department of Health, Education, and Welfare.

In light of the foregoing, the judgment of the District Court is vacated and the case is remanded to that court for an opportunity to pass on the propriety of granting interim relief in accordance with conventional equitable principles on the basis of appellees' statutory claims, or, if the question is reached, continuing the present injunction in light of this Court's decision in *Dandridge* v. *Williams*, — U. S. — (1970).

It is so ordered.

MR. JUSTICE MARSHALL took no part in the decision of this case.

SUPREME COURT OF THE UNITED STATES

No. 896.—October Term, 1969

George K. Wyman, etc., et al., Appellants, *v.* Edna Rothstein et al.	On Appeal From the United States District Court for the Southern District of New York.

[June 1, 1970]

Mr. Justice Black, with whom The Chief Justice joins, dissenting.

When this action was commenced by appellees, the Secretary of Health, Education, and Welfare was in the process of determining if the New York welfare provisions under attack in this case are consistent with the federal standard requiring uniform statewide application of state welfare plans. See Social Security Act § 402, 42 U. S. C. § 602; 45 CFR § 233.20. Although the federal agency has not yet made a final decision, it appears from the Brief submitted by the United States as *amicus curiae* that HEW has made a preliminary determination that the New York provisions do not conform to the Social Security Act's requirements. Accordingly, the statutory claim which this Court today remands to the District Court for its consideration involves a live controversy between New York and the Federal Government, and, as I said in my dissenting opinion in *Rosado* v. *Wyman*, — U. S. —, — (1970), it is my belief that such controversies should be resolved in proceedings between the two governments involved, as provided in the Social Security Act. See, *e. g.*, 42 U. S. C. §§ 602, 1316. For this reason, I would vacate the judgment of the District Court and remand with directions that the complaint be dismissed.